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Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

1. Does the Speech or Debate Clause of the U.S. Constitution, U.S. CONST. art. I, § 6, cl. 1, bar federal court jurisdiction of an action brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000), by a congressional employee whose job duties are part of the due functioning of the legislative process?

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JURISDICTIONAL STATEMENT[1]

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit (App. 1a-57a)[2] is reported at 459 F.3d 1. The underlying "decision" of the U.S. District Court for the District of Columbia is an unreported minute order. A copy of the relevant portion of the district court docket sheet with the

[1] If the Court finds that this appeal is improvidently taken and that the sole mode of review of the judgment of the court of appeals is by petition for writ of certiorari, Appellant respectfully requests that this Court treat these papers as a petition for writ of certiorari.

[2] The pages of the appendices to the jurisdictional statement, attached hereto, are referred to as App. ____.

minute order entry listed after docket entry No. 20 is reprinted at App. 58a-59a.

JURISDICTION

The U.S. Court of Appeals for the District of Columbia Circuit entered judgment on August 18, 2006. (App. 60a-61a.) Appellant filed its notice of appeal on October 31, 2006.[3] (App. 90a-94a.) This Court has appellate jurisdiction under section 412 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1412. (App. 65a.) Alternatively, if this Court treats these papers as a petition for writ of certiorari, jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Speech or Debate Clause of the United States Constitution, U.S. CONST. art. I, § 6, cl. 1, provides in relevant part that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." Article I, Section 6, Clause 1 is reproduced at App. 62a.

STATUTORY PROVISIONS INVOLVED

1. Section 413 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1413, is reproduced at App. 63a.

2. Sections 408(a) and (b) of the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1408(a) and (b), are reproduced at App. 64a.

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[3] The mandate of the court of appeals issued on October 19, 2006. Appellant has filed a notice of appeal to this Court in both the court of appeals and the district court.

STATEMENT

This case addresses the scope of the immunity of the Speech or Debate Clause of the U.S. Constitution in employment law actions brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000) (the "CAA" or "Act"), against United States congressional offices. The D.C. Circuit, sitting en banc, interpreted CAA § 413, 2 U.S.C. § 1413, in a manner that permits court adjudication of CAA cases in violation of the Speech or Debate Clause. The circuit court held that the Speech or Debate Clause is not a jurisdictional bar to this case but that the Clause plays some role in the adjudication of CAA cases; however, the court could not reach a majority opinion as to what that role is. While recognizing that this is "an important case," raising "perplexing questions," App. 31a, 13a, the circuit court provided no clear guidance on how CAA cases can be adjudicated without violating the Constitution.

1. The CAA applies select provisions of eleven federal employment laws to United States congressional offices. 2 U.S.C. § 1302(a). The CAA provides two alternative means of redress: an administrative hearing through the Office of Compliance, which is "an independent office within the legislative branch," 2 U.S.C. § 1381(a), and a civil action in federal district court. 2 U.S.C. § 1404. The CAA provides that only a congressional "employing office" shall be a defendant in a CAA suit. 2 U.S.C. § 1408(b). Although the CAA provides a limited waiver of the sovereign immunity of congressional offices, the Act expressly preserves Speech or Debate Clause immunity. See 2 U.S.C. § 1413. The Speech or Debate Clause "insure[s] that the legislative function the Constitution allocates to Congress may be performed independently" and that the "wisdom of congressional approach or methodology is not open

to judicial veto." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502, 509 (1975).

2. Brad Hanson ("Hanson") is a former employee of the Office of Senator Mark Dayton ("the Dayton Office"). Senator Dayton represents the state of Minnesota. As an employee of the Dayton Office, Hanson regularly met with constituents, community groups, and community leaders to determine their priorities in the healthcare and law enforcement areas. Based on information he gathered from them, he identified and briefed Senator Dayton about opportunities for legislative initiatives. App. 67a-71a, 74a-81a. For example, having learned of problems in Medicare reimbursement for ambulances, Hanson held meetings around Minnesota to determine the extent and scope of the problems, developed potential legislative solutions, and advised Senator Dayton that he should sponsor specific legislation and should hold a congressional hearing to address the problems, which Senator Dayton then did. Hanson was one of a few staff members who planned the hearing Senator Dayton initiated and chaired, decided on the issues for the hearing, selected hearing witnesses, and prepared questions that Senator Dayton asked at the hearing. Hanson also developed follow-up questions that were submitted for the official hearing record. App. 71a-73a, 82a-89a.

3. On May 29, 2003, Hanson filed suit in the United States District Court for the District of Columbia alleging that the Dayton Office had discriminatorily terminated his employment and had failed to pay him overtime in violation of sections 201(a)(3), 202(a), and 203 of the CAA, 2 U.S.C. §§ 1311(a)(3), 1312(a), and 1313, respectively. On September 12, 2003, the Dayton Office moved to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Speech or Debate Clause provides the Dayton Office with absolute immunity from the suit. Without hearing oral

argument, the district court issued a minute order on September 7, 2004, denying the motion to dismiss. App. 59a.

4. The Dayton Office appealed from the district court's denial of its motion to dismiss for lack of subject matter jurisdiction. The case was heard before the en banc court upon order of the D.C. Circuit.[4]

In a fragmented decision, the D.C. Circuit affirmed the district court's order denying the Dayton Office's motion to dismiss. App 27a, 28a, 57a, 60a-61a. The D.C. Circuit rejected the test it had established in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), that "a Member's personnel decision is shielded from judicial scrutiny when 'the [affected] employee's duties were directly related to the due functioning of the legislative process.' [*Browning*, 789 F.2d] at 929 (emphasis removed)." App. 9a (first alteration in original). See also App. 18a, 27a, 28a, 36a, 45a. Aside from the *Browning* test, the only issues on which at least a majority of the circuit court judges agreed are: (i) the Speech or Debate Clause does not bar the court's jurisdiction of Hanson's suit because an examination of the complaint shows that Hanson can make out a prima facie case without relying on legislative acts, App. 20a, 28a, and (ii) the Speech or Debate Clause plays some role in the adjudication of CAA cases. App. 21a, 28a, 31a, 54a. The court was unable to reach consensus on what that role is. Having rejected that the Speech or Debate Clause is a jurisdictional bar to Hanson's suit, Circuit Judge Randolph, joined by Chief Judge Ginsburg and Circuit Judges Henderson and Tatel, found that where the defendant "provide[s] evidence of a legitimate nondiscriminatory reason for the discharge" and "include[s] with this evidence an

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[4] No three-judge panel argument was heard.

affidavit from an individual eligible to invoke the Speech or Debate Clause recounting facts sufficient to show that the challenged personnel decision was taken because of the plaintiff's performance of conduct protected by the Speech or Debate Clause," App. 25a, then "the action most likely must be dismissed," App. 26a, because "[i]n many cases, the plaintiff would be unable to [demonstrate that the defendant's proffered reason was a pretext for discrimination] without 'draw[ing] in question' the legislative activities and the motivations for those activities asserted by the affiant – matters into which the Speech or Debate Clause prohibits judicial inquiry." App. 25a (citation omitted) (last alteration in original). Circuit Judge Brown, with whom Circuit Judges Sentelle and Griffith joined, concurring in the judgment, found that the Speech or Debate Clause "functions [in CAA cases] only as a testimonial and documentary privilege, to be asserted by members and qualified aides if they are called upon to produce evidence" regarding legislative acts, but that "as long as members and their aides are not themselves 'questioned,' an inquiry into legislative acts does not implicate the Speech or Debate Clause." App. 56a. Circuit Judge Rogers, concurring in part and in the judgment, "agree[d] that the [Speech or Debate] Clause's evidentiary privilege has a role to play," App. 28a (internal citations omitted), but "le[ft] open the question of how the Clause may limit evidence offered by parties in CAA litigation." App. 29a.[5]

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[5] Shortly before the Dayton Office filed its appeal with the D.C. Circuit, the Office of Representative Eddie Bernice Johnson also appealed to the D.C. Circuit from the denial of a motion to dismiss a CAA suit that had been brought against it. Like the Dayton Office, the Office of Representative Johnson had moved to dismiss for lack of jurisdiction based on Speech or Debate Clause immunity. App. 7a, 38a. On appeal, the D.C. Circuit, sitting en banc, heard argument on that case and the case at bar on the same day and issued one decision with respect to both cases, although the circuit court did not consolidate the cases. App. 3a; see also 1a-57a.

THE QUESTION PRESENTED IS SUBSTANTIAL

In CAA § 412, Congress vested this Court with appellate jurisdiction of any "interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this Act," and stated that this Court "shall, if it has not previously ruled on the question, accept jurisdiction over the appeal . . . and expedite the appeal to the greatest extent possible." 2 U.S.C. § 1412(a), (b). Congress considered various versions of the CAA over multiple years prior to passing the Act. Early draft bills of the CAA did not expressly preserve Speech or Debate Clause immunity. At the time Congress added CAA § 413, 2 U.S.C. § 1413, expressly preserving Speech or Debate Clause immunity, it also added CAA § 412.[6] By simultaneously adding those sections, Congress demonstrated that a claim challenging a court's application of CAA § 413 is substantial and should be resolved definitively by this Court. The D.C. Circuit's judgment allows court adjudication of a suit challenging a Member's personnel actions with respect to an employee whose job duties were part of the due functioning of the legislative process, thereby violating the Speech or Debate Clause's bar of court adjudication of suits predicated on legislative acts or that question the motivation for such acts. See *United States v. Brewster*, 408 U.S. 501, 512 (1972); *Doe v. McMillan*, 412 U.S. 306, 318 (1973). This Court has not previously ruled on how the Speech or Debate Clause affects CAA cases. Thus, this case falls within the Court's jurisdiction under 2 U.S.C. § 1412.

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[6] Compare S. 2, 104th Cong. (1995), with H.R. 1, 104th Cong. (1995); see also 141 Cong. Rec. H90-94, 104 (daily ed. Jan. 4, 1995); 141 Cong. Rec. S767-79 (daily ed. Jan. 11, 1995); 141 Cong. Rec. S918 (daily ed. Jan. 12, 1995); 141 Cong. Rec. D72 (daily digest Jan. 23, 1995).

I. THE D.C. CIRCUIT'S FRAGMENTED DECISION PERMITS EMPLOYMENT LAW ACTIONS BY CONGRESSIONAL EMPLOYEES TO PROCEED IN VIOLATION OF THE SPEECH OR DEBATE CLAUSE OF THE U.S. CONSTITUTION

A. The Speech Or Debate Clause Bars Judicial Intrusion Into A Member Of Congress's Management Of Employees Whose Job Duties Are Part Of The Due Functioning Of The Legislative Process

The Speech or Debate Clause is grounded in separation of powers principles that are necessary "to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). The "central role" of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972) (citing *United States v. Johnson*, 383 U.S. 169, 181 (1966)). The Clause "insure[s] that the legislative function the Constitution allocates to Congress may be performed independently," *Eastland*, 421 U.S. at 502, and that the "wisdom of congressional approach or methodology is not open to judicial veto," *id.* at 509. The Speech or Debate Clause "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *Brewster*, 408 U.S. at 525. See also *Eastland*, 421 U.S. at 508.

"Without exception, [this Court's] cases have read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501; see, *e.g.*, *Brewster*, 408 U.S. at 516 ("In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to

slander and even destroy others with impunity, but that was the conscious choice of the Framers."); *Gravel*, 408 U.S. at 618 ("Rather than giving the Clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from . . . judicial oversight that realistically threatens to control his conduct as a legislator."); see also *Coffin v. Coffin*, 4 Mass. 1, 27 (1808) (the Clause "ought not to be construed strictly, but liberally, that the full design of it may be answered . . . . [The privilege] secur[es] to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office.").[7] Thus, this Court has determined that the Speech or Debate Clause governs more than just speeches and debates on the floors and at committee hearings of the House and Senate. The Clause protects *all* acts that are within the "legitimate legislative sphere." *Eastland*, 421 U.S. at 503. "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' *Gravel v. United States*, [408 U.S.] at 624-25, even though their conduct, if performed in other than legislative contexts, would, in itself, be unconstitutional or otherwise contrary to criminal or civil statutes." *McMillan*, 412 U.S. at 312-13; see also *Eastland*, 421 U.S. at 501.

An act is within the legislative sphere when it is "part of the legislative process – the *due* functioning of the process." *Brewster*, 408 U.S. at 516; see *McMillan*, 412 U.S. at 317 (unprotected activity is that which is "beyond the apparent needs of the '*due* functioning of the [legislative] process'")

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[7] This Court has stated that *Coffin* "is, perhaps, the most authoritative case in this country on the construction of the provision [Speech or Debate Clause] in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

(quoting *Brewster*, 408 U.S. at 516) (alteration in original). This Court has further explained that an act is within the legislative sphere if it is

> "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

Eastland, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625). Among the acts included within the above definition are "communications between [a] Senator and his aides during the term of their employment . . . related to . . . any . . . legislative act of the Senator," *Gravel*, 408 U.S. at 629; and gathering information to inform a member of Congress in the performance of the Member's legislative duties, see *Eastland*, 421 U.S. at 504 ("'[a] legislative body cannot legislate wisely, or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.' *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).") (alteration in original).

Moreover, the Speech or Debate Clause is not merely an evidentiary privilege. Acts within the legislative sphere "may not serve as a predicate for a suit." *McMillan*, 412 U.S. at 318. The Clause protects legislators "'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Eastland*, 421 U.S. at 503 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). In addition, Speech or Debate Clause immunity is absolute. "We reaffirm that once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is

an absolute bar to interference." *Id.* (citing *McMillan*, 412 U.S. at 314).

Further, this Court has recognized that to fulfill the central purpose of the Speech or Debate Clause, a Member's aides and assistants must be treated as the Member's alter egos.

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause – to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181 (1966) – will inevitably be diminished and frustrated.

Gravel, 408 U.S. at 616-17. See also *Davis v. Passman*, 442 U.S. 228, 254 (1979) ("A Congressman simply cannot perform his constitutional duties effectively, or serve his constituents properly, unless he is supported by a staff in which he has total confidence.") (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

This Court has never directly addressed the issue of whether the Speech or Debate Clause precludes federal court adjudication of congressional personnel actions. The closest this Court has come to addressing the issue is *Passman*, 442 U.S. 228. In *Passman*, a former employee of U.S. Congressman Passman sued him alleging he had discharged her

because of her gender in violation of the Fifth Amendment to the U.S. Constitution. Congressman Passman moved to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the basis that the Speech or Debate Clause provided him with absolute immunity from the claims, and under Rule 12(b)(6) on the ground that no private right of action exists under the Fifth Amendment. *Id.* at 232 n.5. The district court dismissed the case on the 12(b)(6) argument. *Id.* at 232. The en banc Court of Appeals for the Fifth Circuit held that the plaintiff did not have a private cause of action under the Fifth Amendment, but the court did not decide the immunity issue. *Id.* This Court reversed the en banc court of appeals as to its 12(b)(6) holding. *Id.* at 234. While pretermitting whether the Speech or Debate Clause shielded Congressman Passman's conduct, this Court "h[e]ld that judicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause," *id.* at 235 n.11, and stated that the Clause "protects Congressmen for conduct necessary to perform their duties 'within the "sphere of legitimate legislative activity,"'" *id.* (quoting *Eastland*, 421 U.S. at 501).

Two dissenting Justices in *Passman* thought that the Court should have addressed the Speech or Debate Clause immunity issue:

> The present case . . . involves a preliminary question that may be completely dispositive, for, as the Court recognizes, "the [Speech or Debate] Clause shields federal legislators with absolute immunity 'not only from the consequences of litigation's results but also from the burden of defending themselves.' *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)." *Ante*, at 236 n.11. See also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503.

> If, therefore, the respondent's alleged conduct was within the immunity of the Speech or Debate Clause, that is the end of this case, regardless of the abstract existence of a cause of action or a damages remedy. Accordingly, it seems clear to me that the first question to be addressed in this litigation is the Speech or Debate Clause claim – a claim that is far from frivolous.

442 U.S. at 251 (Stewart, J., joined by Rehnquist, J., dissenting) (first alteration in original).

Three years after *Passman*, this Court decided *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), in which the Court addressed the issue of whether the President is absolutely immune for personnel actions taken against an Executive Branch employee. In *Fitzgerald*, a management analyst with the Department of the Air Force testified before Congress about the Air Force's cost overruns. *Id.* at 734 n.1. The analyst was subsequently terminated, and evidence showed that President Nixon was involved in the termination decision. *Id.* at 733, 737. Suing President Nixon, among others, the analyst alleged that he was terminated in retaliation for his testimony before Congress. The district court denied the President's claim of absolute immunity, and the appellate court summarily dismissed the President's collateral appeal, holding that the President did not have absolute immunity from the analyst's claims. *Id.* at 740-41. Reversing, this Court recognized that although the President has no expressly-stated absolute immunity under the Constitution as do members of Congress, *id.* at 750 n.31, his absolute immunity could be inferred due to "history" and "constitutional tradition" and the President's "unique position in the constitutional scheme," *id.* at 749. This Court held that the basis of this inferred, absolute immunity is the separation of powers. *Id.* This Court further held that the immunity protects

the President from suit for any action he takes within his "sphere of responsibility." *Id.* at 760-61 (Burger, C.J., concurring); see also *id.* at 749. The President's constitutional sphere of responsibility includes being Commander in Chief of the Armed Forces. See *id.* at 757; see also U.S. CONST. art. II, § 2. That responsibility, this Court held, "must include the authority to prescribe reorganizations and [terminations]." 457 U.S. at 757. This Court concluded, therefore, that a court could not second guess the President's decision to fire staff who fulfilled duties within the President's sphere of responsibility, *id.*, even when those staff were as far removed from the President's immediate sphere as was the management analyst working at the Pentagon. As Chief Justice Burger stated:

> [T]he Judiciary always must be hesitant to probe into the elements of Presidential decisionmaking . . . . Such judicial intervention is not to be tolerated absent imperative constitutional necessity . . . . [J]udicial intrusion through private damages actions improperly impinges on and hence interferes with the independence that is imperative to the functioning of the office of a President.
>
> . . . Absent absolute immunity . . . each suit . . . would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information. Such scrutiny of day-to-day decisions of the Executive Branch would be bound to occur . . . . [T]he need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims.

Id. at 761-62 (Burger, C.J., concurring). As discussed below, the decision of the court below is inconsistent with Speech or Debate Clause jurisprudence.

The court of appeals below rejected the panel's decision in *Browning*, 789 F.2d 923. *Browning* had held that personnel actions taken against a congressional employee whose job duties are "directly related to the due functioning of the legislative process" are barred by the Speech or Debate Clause because such personnel actions are within the legislative sphere. *Id.* at 929 (emphasis omitted). The court below rejected *Browning* on the ground that it was "overinclusive," App 17a. (Randolph, J.), or "overbroad," App. 28a (Rogers, J.); see also App. 45a (Brown, J.). Circuit Judge Randolph concluded that the *Browning* test was too broad because, "[a]t best, that an employee's duties are directly related to the legislative process establishes merely 'some nexus' between the personnel decision and that process."[8] App. 17a. In *Brewster*, 408 U.S. 501, this Court held that the Speech or Debate Clause does not protect acts that are merely "'related' to the office of a Member," *id.* at 513-14, or "'relate[d]' to the legislative process," *id.* at 516, but the Clause does protect all acts that are "part of . . . the *due* functioning of the [legislative] process." *Id.* To the extent that the *Browning* term "directly related to the due functioning of the legislative process" is broader than "part of the due functioning of the legislative process," the *Browning* test is too broad. But despite that language difference, Judge Randolph's conclusion is flawed. His analysis focuses on

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[8] Similarly, in rejecting the *Browning* test as too broad, Judge Brown found an employee's duties "an imperfect metric" for determining whether an employee's lawsuit will involve the court in matters within the legislative sphere. App. 45a. Judge Rogers found the *Browning* test overbroad "[f]or reasons stated in the opinions by Judge Randolph and Judge Brown." App. 28a.

whether the personnel action is part of the legislative "process." See, *e.g.*, App. 18a (Speech or Debate Clause protects conduct that is integral to the Member's legislative process), App. 17a ("establishes merely 'some nexus' between the personnel decision and that process"). A personnel action, however, is protected by the Speech or Debate Clause if it is part of the *due functioning* of the legislative process. The "functioning" of the process means the modus operandi of the process. In determining how his legislative process will function, a Member must decide matters such as which legislative duties he will perform himself, which legislative duties he will delegate to his employees, and how he wants those duties performed. That decision making is part of the functioning of his legislative process. When the Member takes personnel actions with respect to employees whose job duties are part of the due functioning of the legislative process, for example hires, fires, demotes, or assigns duties, the personnel actions are part of the due functioning of the legislative process: they are actions the Member takes to make the legislative process function. Such personnel actions are, therefore, protected by the Speech or Debate Clause. Moreover, contrary to Judge Randolph's conclusion, the Member's reason for the termination is irrelevant. Even when such an employee is terminated for tardiness, the termination is part of the due functioning of the legislative process: the Member has determined that his legislative process will function with fewer people or with someone other than that employee. Similarly, when an employee whose duties are part of the due functioning of the legislative process is demoted or rejected for a position, those personnel actions are part of the due functioning of the legislative process because the Member's decision about who he needs, and in what job positions he needs them, to make his legislative process function is itself part of the functioning of

his legislative process.[9] This is not to say, however, that *all* actions taken with respect to such an employee are part of the due functioning of the legislative process. For example, suppose that a Member's legislative director creates a hostile work environment, and a legislative assistant files a CAA action alleging sexual harassment. Creating a hostile work environment, unlike hiring, firing, demoting, and assigning duties, is objectively "beyond the apparent needs of the 'due functioning of the [legislative] process,'" *McMillan*, 412 U.S. at 317 (quoting *Brewster*, 408 U.S. at 516) (alteration in original), and therefore is not covered by Speech or Debate Clause immunity.

Judge Randolph also found this Court's *Fitzgerald* decision, 457 U.S. 731, inapposite to this case because the "President's immunity is based on his 'unique position in the constitutional scheme' and the 'singular importance of the President's duties.'" App. 19a (internal citations omitted). While this Court in *Fitzgerald* cited the President's "unique position in the constitutional scheme," 457 U.S. at 749, and the "singular importance of the President's duties," *id.* at 751, to justify the Court's inference that the President was entitled to an absolute immunity for his official acts, this Court did so because the President has no textual, absolute immunity. It does not follow that those who do not hold such a "unique" position are not protected by an absolute immunity. Members

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[9] Even limiting the Speech or Debate Clause's jurisdictional bar to challenges of personnel actions taken because of an employee's non-performance of duties within the legislative sphere would violate the Speech or Debate Clause. If the personnel action was taken due to the employee's non-performance of acts within the legislative sphere, then conditioning dismissal of the case on the defendant's submission of evidence of the reason for the personnel action would constitute questioning the motivation of a legislative act, thus violating the Speech or Debate Clause. See *Brewster*, 408 U.S. at 525.

of Congress are entitled to absolute immunity because the Constitution expressly grants it to them; inferring an immunity for them is unnecessary.

The Speech or Debate Clause absolute immunity, like the President's inferred absolute immunity, is grounded in separation of powers principles. Compare *Fitzgerald*, 457 U.S. at 749 (the President's absolute immunity is "rooted in the constitutional tradition of the separations of powers"), with *United States v. Gillock*, 445 U.S. 360, 370 (1980) (the Speech or Debate Clause "rest[s] solely on the separation of powers doctrine"). Thus, the purpose of the President's inferred absolute immunity and the Members' textual immunity is the same – to allow independent functioning of coequal branches of government within their respective, constitutionally-delegated sphere of responsibilities. *Compare Helstoski*, 442 U.S. at 491 (purpose of Speech or Debate Clause is to prevent "intrusion by the . . . Judiciary into the sphere of protected legislative activities"), with *Fitzgerald*, 457 U.S. at 761 (purpose of President's inferred immunity is to prevent "judicial intervention" into the President's "sphere of responsibility") (Burger, C.J., concurring). Congress's "sphere of responsibility" is all federal legislative powers. See U.S. CONST. art. I, § 1. Just as this Court concluded that the President's constitutional mandate of commanding the Armed Forces necessarily includes the authority to manage, without judicial interference, a management analyst who fulfilled duties within the President's sphere of responsibilities, so too a Member's constitutional mandate of handling all legislative matters necessarily includes the authority to manage, without judicial interference, employees who fulfill duties that are within the legislative sphere. Indeed, in *Fitzgerald* this Court recognized that it was extending to the President protections similar to those the Speech or Debate Clause affords Members:

> Although the individual who claims wrongful conduct may indeed have sustained some injury, the need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims. We have decided that in a similar sense Members of both Houses of Congress – and their aides – must be totally free from judicial scrutiny for legislative acts.

Fitzgerald, 457 U.S. at 762 (Burger, C.J., concurring).

An additional reason Circuit Judge Brown rejected the *Browning* test as overbroad is that it defined "very broadly the type of duties that might constitute 'an integral part of the legislative process'—even including within that definition a House reporter who lacked discretionary authority." App. 44a-45a. In determining whether an employee's duties are within the legislative sphere, this Court examines whether the duties are part of the due functioning of the legislative process, not whether the employee exercises discretionary authority. See *McMillan*, 412 U.S. at 317, 324 (Public Printer and Superintendent of Documents protected by Speech or Debate Clause immunity to the extent their distribution of reports was part of the due functioning of the legislative process).

Moreover, to the extent the court below relied on *Forrester v. White*, 484 U.S. 219 (1988) (see App. 9a-10a), in rejecting the *Browning* framework, its reliance was misplaced for several reasons. First, *Forrester* addressed common law immunity applicable to a state judge, which is not comparable or analogous to Speech or Debate Clause immunity. "[J]udicial immunity affords less protection than legislative immunity under the Speech or Debate Clause." *Eades v. Sterlinske*, 810 F.2d 723, 725 n.1 (7th Cir. 1987) (citing *Dennis v. Sparks*,

449 U.S. 24, 30 (1980)). "This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S. Const., Art. I, § 6, cl. 1." *Forrester*, 484 U.S. at 224. Second, while Speech or Debate Clause immunity protects the separation of powers among independent, coequal branches of the federal government, see *Gillock*, 445 U.S. at 369-70, the separation of powers principle is inapplicable to the federal judiciary's relationship to the states because the federal judiciary and the states are not independent, coequal branches of government. See *id.* at 370. Third, this Court has stated that the *Forrester* "functional" test does not apply where Speech or Debate Clause immunity is involved: "Running through our cases, with fair consistency, is a 'functional' approach to immunity questions *other than those that have been decided by express constitutional or statutory enactment.*" *Forrester*, 484 U.S. at 224 (emphasis added). Fourth, while this Court found in *Forrester* that a state judge's administrative acts are not covered by common law judicial immunity, in *McMillan* this Court held that Speech or Debate Clause immunity covers administrative acts, printing and mailing documents within and outside Congress to such places as law firm libraries, that are within the legislative sphere. *McMillan*, 412 U.S. at 318, 324.[10]

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[10] Because the record before this Court in *McMillan* provided "little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, ha[d] been exceeded," this Court remanded the case for a determination of whether the functionaries' administrative acts were within the legitimate legislative sphere. *McMillan*, 412 U.S. at 324-25. On remand, the district court found that the functionaries' acts were within the legitimate legislative sphere and dismissed the complaint as to them based on Speech or Debate Clause immunity. The Court of Appeals for the D.C. Circuit affirmed. *Doe v. McMillan*, 566 F.2d 713, 715, 718 (D.C. Cir. 1977).

In summary, the court below erred in finding that the Speech or Debate Clause is not a jurisdictional bar to CAA employment suits filed by an employee whose job duties are part of the due functioning of the legislative process. Personnel actions taken with respect to such an employee are part of the due functioning of the legislative process unless they are objectively beyond the apparent needs of the due functioning of the legislative process. Accordingly, the Speech or Debate Clause is an absolute bar to judicial interference with those personnel actions.

B. The Disparate Opinions Of The Circuit Judges As To Why The Speech Or Debate Clause Is Not A Jurisdictional Bar To Hanson's Suit Are Inconsistent With This Court's Speech Or Debate Clause Jurisprudence

Having rejected the framework it had previously established in *Browning*, the D.C. Circuit considered whether the Speech or Debate Clause nevertheless bars jurisdiction of Hanson's suit on some other basis. While the court concluded that the Clause is not a jurisdictional bar to Hanson's suit, the judges differed in their reasoning. Circuit Judge Randolph, joined by Chief Judge Ginsburg and Circuit Judges Henderson and Tatel, concluded that the Speech or Debate Clause does not present a jurisdictional bar to Hanson's suit because "it does not appear from . . . Hanson's complaint[] that [he] sought to predicate liability on protected conduct," *i.e.*, on acts within the legislative sphere. App. 20a. That is the sole basis on which Judge Randolph determined that the Clause does not bar jurisdiction of Hanson's suit. In her opinion concurring in part and in the judgment, Circuit Judge Rogers similarly found that the Speech or Debate Clause does not bar Hanson's suit because "an examination of the complaint[] makes clear that

[Hanson does not need to] rely on legislative acts to make a *prima facie* case," App. 28a.[11] Their rationale is flawed.

A court may consider materials outside the pleadings to satisfy itself that it has subject matter jurisdiction of a case. See *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 184 (1936). In most civil cases, the pleadings need not even set forth a prima facie case. See *Swierkiewicz v. Sorema*, 534 U.S. 506, 515 (2002). For example, in a discrimination case, the D.C. Circuit explained that "'[b]ecause racial discrimination in employment is 'a claim upon which relief can be granted,'... 'I was turned down for a job because of my race' is all a complaint has to say' to survive a motion to dismiss under Rule 12(b)(6)." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1115 (D.C. Cir. 2000) (quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998)). In determining whether a claim is jurisdictionally barred, examining the complaint alone is much too restrictive. Indeed, finding such an examination to be conclusive would eviscerate the protections of the Speech or Debate Clause. See *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader . . . ."). Therefore, where the defendant moves pursuant to FED. R. CIV. P. 12(b)(1) to dismiss for lack of jurisdiction and supports its motion with a declaration or other relevant material, as the Dayton Office did, the court should consider all material

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[11] Judge Rogers appears to take the position that the Speech or Debate Clause also does not bar Hanson's suit because personnel actions are never "legislative acts." App. 28a. In this regard, she references this Court's decision in *Forrester*, 484 U.S. 219. As explained *supra* pp. 15-17, 19-20, Judge Rogers's conclusion is incorrect, and *Forrester* is inapposite to a determination as to the scope of Speech or Debate Clause immunity.

submitted, not just the complaint, in determining whether it has jurisdiction.

Moreover, Judge Randolph interprets the Speech or Debate Clause too narrowly. While his application of the Clause takes into account that a plaintiff cannot question acts within the legislative sphere or the motivation for those acts, it does not take into account that a Member cannot be made to answer – in terms of defending himself – for legislative acts or his motivation for actions within the legislative sphere. See *Gravel*, 408 U.S. at 616 ("We have no doubt that Senator Gravel may not be made to answer – either in terms of questions *or in terms of defending himself* from prosecution – for the events that occurred at the subcommittee hearing") (emphasis added). Cf. *Passman*, 442 U.S. at 235 n.11 ("Defenses based upon the Clause should thus ordinarily be given priority, since federal legislators should be exempted from litigation if their conduct is in fact protected by the Clause."); *Fitzgerald*, 457 U.S. at 762 ("Absent absolute immunity, . . . each suit . . . would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information.").[12]

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[12] Judge Randolph recognizes that if the defendant asserts that it took the challenged personnel action based on the plaintiff's performance of acts within the legislative sphere, then the plaintiff cannot seek to prevail by "draw[ing] in question the legislative activities and the motivation for those activities" asserted by the defendant. App. 25a (internal quotation marks omitted); see also App. 24a-27a. He ignores the fact, however, that requiring the production of evidence concerning legislative acts or the motivation for those acts either in defendant's response to the employee's prima facie case or in an affidavit invoking Speech or Debate Clause immunity, see App. 23a-26a, would itself violate the Clause.

Circuit Judge Brown, with whom Circuit Judges Sentelle and Griffith join, concurring in the judgment, finds that the Speech or Debate Clause's jurisdictional bar is not applicable to Hanson's suit or any other CAA action because the defendant in such suits is not the Member or the Member's alter ego, but rather an "employing office."[13] App. 45a-53a. That position is inconsistent with Speech or Debate Clause jurisprudence. This Court has not held that an act within the legislative sphere can form the predicate for a suit as long as a Member or his alter ego is the named defendant. Rather, such an act cannot form the predicate for a suit – period. See *McMillan*, 412 U.S. at 324 (Public Printer and Superintendent of Documents protected by Speech or Debate Clause immunity to the extent their actions are within the legislative sphere); see also *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (legislative committees can invoke legislative privilege). Regardless of who the defendant is, allowing Hanson's suit to proceed would violate the Speech or Debate Clause by allowing intrusion of the judiciary into the legislative sphere, including referencing past legislative acts, judging a Member's motives as to acts within the legislative sphere, and imperiling

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[13] Judge Brown found that the Speech or Debate Clause has only an evidentiary application in CAA cases. Even in that regard, however, her view is too restrictive. According to Judge Brown, the Clause functions as a testimonial and documentary privilege that only Members and qualified aides can assert when they are called to produce evidence regarding legislative acts, but the Clause plays no role to the extent others are questioned about legislative acts. App. 56a. That conclusion is contrary to this Court's holding in *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951), that legislative committees can invoke legislative privilege. See also *McMillan*, 412 U.S. at 324-25 (Public Printer and Superintendent of Documents protected by Speech or Debate Clause immunity to the extent their acts are within the legitimate legislative sphere).

legislative independence. See, *e.g.*, *Brewster*, 408 U.S. at 512; *Eastland*, 421 U.S. at 502-503; *Helstoski*, 442 U.S. at 490.[14]

In conclusion, the finding by some of the judges below that the Speech or Debate Clause never bars jurisdiction of CAA actions is inconsistent with Speech or Debate Clause precedent. Moreover, the framework used by the other judges below in determining whether the Speech or Debate Clause bars jurisdiction of a CAA suit is too restrictive because it does not consider material outside the complaint or a Member's defenses to the challenged action.

II. WHILE RECOGNIZING THAT THIS IS AN "IMPORTANT CASE" RAISING "PERPLEXING QUESTIONS," THE EN BANC COURT WAS UNABLE TO REACH A MAJORITY OPINION ON THE APPLICATION OF THE SPEECH OR DEBATE CLAUSE TO EMPLOYMENT CASES FILED BY CONGRESSIONAL EMPLOYEES; THIS COURT SHOULD RESOLVE THAT IMPORTANT ISSUE

In 1979 this Court last decided a case in which application of the Speech or Debate Clause was at issue. See *Helstoski*, 442 U.S. 477 (1979), and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (decided on the same day). Neither of those cases, however, involved application of the Speech or Debate Clause in an employment suit.

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[14] Judge Brown intimates that if the named defendant were a Member, the Speech or Debate Clause should jurisdictionally bar not only CAA actions "in which the complaints are predicated on legislative acts, but also suits that will inevitably necessitate an inquiry into such acts and motivations, even where such inquiry would arise due to an affirmative defense." App. 53a n.3.

As the decision of the D.C. Circuit below and the Tenth Circuit's decision in *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301 (10th Cir. 2004), cert. denied, 126 S. Ct. 396 (2005), show, judges and courts disagree on the scope and application of the Speech or Debate Clause in CAA employment suits. See, *e.g.*, App. 23 n.23 ("Judge Brown's concurrence states that 'there is little reason to believe that allowing these suits to proceed will threaten legislative independence or unduly involve the judicial branch in the affairs of the legislative branch.' This speculation has no basis in reality. The Accountability Act authorizes suits based on conduct occurring in a Member's personal office, see 2 U.S.C. § 1408(b), which necessarily calls into question the actions of Members or their aides.") (opinion for the court in part filed by Randolph, J., with whom Ginsburg, C.J., and Henderson and Tatel, JJ., join) (internal citation omitted); App. 28a-29a (the "role [of the Speech or Debate Clause] presents potentially difficult questions, particularly as the Supreme Court has yet to speak to the question in this context, and its statements in other contexts can be understood to point in different directions, as the opinions of Judge Randolph and Judge Brown reflect.") (Rogers, J., concurring in part and in the judgment). Compare *Bastien*, 390 F.3d at 1315, 1316 (court unduly restricted the protections of the Speech or Debate Clause to matters "confined within the limits of formal, official proceedings" of Congress and found that Speech or Debate Clause immunity does not extend to "informal information gathering by individual members of Congress") with *McSurely v. McClellan*, 553 F.2d 1277, 1286, 1287 (D.C. Cir. 1976) (en banc) ("We have no doubt that information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation" and hence "'within the ambit of the [Speech or Debate Clause] privilege.'") (internal citation omitted). Given the importance of the Speech or Debate Clause in our constitutional scheme

and the need to prevent large scale intrusion of the legislative function by the judiciary, this Court should provide the lower courts with guidance as to the scope of the Clause and how it applies in employment suits by congressional employees whose job duties are part of the due functioning of the legislative process.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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NOVEMBER 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 30, 2005 Decided August 18, 2006

No. 04-5315

BEVERLY A. FIELDS,
APPELLEE

v.

OFFICE OF EDDIE BERNICE JOHNSON,
EMPLOYING OFFICE, UNITED STATES CONGRESS,
APPELLANT

No. 04-5335

BRAD HANSON,
APPELLEE

v.

OFFICE OF SENATOR MARK DAYTON,
APPELLANT

Appeals from the United States District Court
for the District of Columbia
(No. 04cv00717)
(No. 03cv01149)

William F. Allen, Attorney, Office of House Employment Counsel, argued the cause of appellant in No. 04-5315. With him on the briefs was *Kimberly Carey Williams*, Attorney. *Gloria L. Ferguson*, Attorney, entered an appearance.

Geraldine R. Gennet, General Counsel, U.S. House of Representatives, and *Kerry W. Kircher*, Deputy General Counsel, were on the brief for *amicus curiae* Bipartisan Legal Advisory Group of the United States House of Representatives in No. 04-5315.

Henry J. Hyde, pro se, was on the brief for *amicus curiae* Congressman Henry J. Hyde in support of appellant in No. 04-5315.

Wayne Marcus Scriven argued the cause and filed the brief for appellee in No. 04-5315.

Jean M. Manning, Chief Counsel, Office of Senate Chief Counsel for Employment, argued the cause for appellant in No. 04-5335. With her on the briefs was *Toby R. Hyman*, Senior Counsel. *Mary S. Bach*, Counsel, entered an appearance.

Richard A. Salzman argued the cause for appellee in No. 04-5335. With him on the brief were *Douglas B. Huron* and *Tammy M. Kramer*.

Before: GINSBURG, *Chief Judge*, and SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, BROWN, and GRIFFITH, *Circuit Judges*.*

Opinion for the Court in part filed by *Circuit Judge* RANDOLPH, an opinion in which *Chief Judge* GINSBURG and *Circuit Judges* HENDERSON and TATEL join.

Opinion concurring in part and in the judgment filed by *Circuit Judge* ROGERS.

Concurring opinion filed by *Circuit Judge* TATEL.

Opinion concurring in the judgment filed by *Circuit Judge* BROWN, with whom *Circuit Judges* SENTELLE and GRIFFITH join.

RANDOLPH, *Circuit Judge*: Article I, section 6 of the Constitution provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." We ordered these two appeals to be argued together en banc in order to determine whether the Speech or Debate Clause requires dismissal of these suits brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438, and whether *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), should remain the law of this circuit.

I.

No. 04-5315 is an appeal from a district court order denying a motion to dismiss a complaint alleging that the

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* Circuit Judges Garland and Kavanaugh did not participate in this matter.

Office of Representative Eddie Bernice Johnson discriminated against Beverly A. Fields because of her race and gender and retaliated against her for objecting to discriminatory conduct. No. 04-5335 is an appeal from a district court order denying a motion to dismiss a complaint alleging that the Office of Senator Mark Dayton discriminated against Brad Hanson because of a perceived disability and violated the Fair Labor Standards Act. The Office of Representative Johnson and the Office of Senator Dayton (collectively, the "Member Offices") claim that the Speech or Debate Clause immunizes them from these suits and that the district court should have dismissed the complaints for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1).[1]

A.

Fields and Hanson each sued under the Accountability Act. The Act confers on "covered employees" rights and remedies drawn from various labor and employment statutes not previously applicable to the legislative branch.[2] 2 U.S.C. § 1302(a); *see id.* §§ 1311-16, 1331, 1341, 1351. It also

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[1] Although we do not ordinarily have jurisdiction to review an order denying a motion to dismiss because such an order is not "final" under 28 U.S.C. § 1291, *Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, 333 F.3d 250, 253 (D.C. Cir. 2003), "[i]ssues of Speech or Debate Clause immunity may be immediately appealed," *Browning*, 789 F.2d at 926 n.6 (citing *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979)).

[2] Of particular relevance here, the Accountability Act incorporates portions of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of Titles 2, 5, and 29 of the U.S. Code), and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796*l*. *See* 2 U.S.C. § 1302(a).

includes an anti-retaliation provision that prohibits "an employing office" from "intimidat[ing], tak[ing] reprisal against, or otherwise discriminat[ing] against, any covered employee because the covered employee has opposed" or reported "any practice made unlawful" by the Accountability Act. *Id.* § 1317(a). A "covered employee" is an individual employed by the House of Representatives, the Senate, or some other office specifically enumerated in the statute. *Id.* § 1301(3).[3]

Section 1404(2) creates a cause of action for covered employees to sue in federal court for violations of the Accountability Act. Section 1408(a) vests the "district courts of the United States" with "jurisdiction over any civil action commenced under section 1404." Before initiating such an action, the employee must seek counseling by, and mediation with, the Office of Compliance, *id.* § 1408(a); *see* §§ 1402-1403, "an independent office within the legislative branch," *id.* § 1381(a). Thereafter, the employee may bring an action against "the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred." *Id.* § 1408(b). An "employing office" for these purposes includes "the personal office of a Member of the House of Representatives or of a Senator." *Id.* § 1301(9)(A).

Fields, an African American female and the plaintiff in No. 04-5315, served as Representative Johnson's chief of staff from January 2002 until her discharge in early 2004. The parties agree that as chief of staff, Fields was deeply involved in a wide array of Representative Johnson's legislative work. Fields's complaint alleged as follows. Elisabeth Howie, a "Black Latino," worked as an executive assistant and scheduler

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[3] The statute also protects former employees and applicants for employment. 2 U.S.C. § 1301(4).

for the Office of Representative Johnson. In April 2003, the office decided to replace Howie with "an Asian person under the age of 40." Fields objected, but her objections were rebuffed, and she was directed to give Howie one day's notice that she was being terminated.

After Fields made her objections to Howie's termination known around the office, her co-workers began falsely accusing her of poor performance. Fields alleged they did so because they wanted "a Caucasian male rather than an African American female" to be Representative Johnson's chief of staff. Their efforts eventually succeeded when the Office of Representative Johnson promoted a non-African American male employee to chief of staff and demoted Fields to administrative assistant. The Office of Representative Johnson increased the new chief of staff's salary by approximately $10,000 – something it failed to do for Fields despite promising her a salary increase when she was chief of staff.

Fields filed an employment discrimination complaint with the Office of Compliance on December 18, 2003, and began the required counseling and mediation. While this was going on, the Office of Representative Johnson "initiated a bad faith and bogus investigation of plaintiff's conduct as an employee . . . to embarrass plaintiff before her co-workers and to force plaintiff to resign from her employment position." When Fields refused either to drop her discrimination claims or to resign, she was abruptly terminated. In response to this additional retaliation, Fields filed a second employment discrimination complaint with the Office of Compliance on March 11, 2004, and again complied with the counseling and mediation requirements.

After exhausting her administrative remedies, Fields sued the Office of Representative Johnson under the Accountability Act. She alleged racial and gender discrimination in violation

of 2 U.S.C. § 1311(a)(1) (incorporating § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2), equal pay discrimination in violation of 2 U.S.C. § 1313(a)(1) (incorporating §§ 6(a)(1) and (d), 7, and 12(c) of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206(a)(1), (d), 207, 212(c)), and two counts of retaliation in violation of 2 U.S.C. § 1317(a). The Office of Representative Johnson moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1), asserting immunity from suit under the Speech or Debate Clause. The district court denied the motion to dismiss without explanation. After ordering an en banc review, we granted Representative Johnson's motion to intervene for the limited purpose of asserting her Speech or Debate Clause immunity.

Brad Hanson, the plaintiff in No. 04-5335, joined Senator Dayton's Senate campaign in July 2000 and began serving as State Office Manager in Senator Dayton's Ft. Snelling, Minnesota, office upon the Senator's election to office. Hanson's complaint alleged as follows. Hanson's work for Senator Dayton centered on "setting up the Senator's three local offices in Minnesota" and overseeing "the transition of the Health Care Help Line to Senator Dayton's personal Senate office."[4] The Health Care Help Line "offered assistance to people having difficulties with their health insurance carriers, HMO's or physicians." This work often required Hanson, an employee entitled to overtime pay under the Fair Labor Standards Act, to work overtime. The Office of Senator Dayton never paid him for this overtime, even though the

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[4] The parties agree that Hanson spent much of his time working on the Health Care Help Line, but they disagree about whether this and other assistance Hanson provided to Senator Dayton constituted legislative activities or merely "constituent services."

Office "recognized" his "effectiveness" by increasing his salary and paying him a bonus in January 2002.

Hanson began experiencing cardiac arrhythmia early in 2002. His physician advised him to undergo a coronary ablation. The surgery would require only a short hospital stay, but Hanson would need two to three weeks away from work to recover. Hanson informed his co-workers that he needed heart surgery and arranged a short meeting with Senator Dayton on July 3, 2002, in the Ft. Snelling office to share the news with him. "The meeting had not gone on for more than five minutes when the Senator abruptly told Hanson, 'You're done,'" without explanation. Senator Dayton told Hanson to stop reporting to the office and to take medical leave instead. Matt McGowan, Senator Dayton's Washington Office Manager, later called Hanson at home to inform him that "he would be terminated as of September 30." Hanson then underwent coronary ablation and fully recovered.

Hanson sued the Office of Senator Dayton under the Accountability Act after exhausting his administrative remedies. His complaint accused the Office of Senator Dayton of violating 2 U.S.C. § 1312(a) (incorporating §§ 101-105 of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611-2615), discriminating against him on the basis of a perceived disability in violation of 2 U.S.C. § 1311(a)(3) (incorporating § 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, and §§ 102-104 of the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12112-12114), and failing to pay him overtime compensation in violation of 2 U.S.C. § 1313 (incorporating the aforementioned provisions of the Fair Labor Standards Act). The Office of Senator Dayton asserted immunity from suit under the Speech or Debate Clause and moved to dismiss the complaint for lack of

subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1).[5] The district court denied the motion without explanation.

B.

Relying on *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), the Member Offices argue that the district court lacked jurisdiction and should have dismissed these suits because the Speech or Debate Clause immunizes them from suits challenging personnel decisions concerning employees like Fields and Hanson who assist Members in performing legislative functions.

In *Browning*, a former employee of the House of Representatives sued the Speaker and other House officers for employment discrimination. *Id.* at 924 & n.2. Browning was "the first black Official Reporter employed by the United States House of Representatives." *Id.* at 924. She claimed that despite some poor performance on the job, "the true reason behind her dismissal was racial animus." *Id.* We held that a Member's personnel decision is shielded from judicial scrutiny when "the [affected] employee's duties were directly related to the due functioning of the legislative process." *Id.* at 929 (emphasis removed).

Later decisions cast doubt on *Browning*. Two years after *Browning*, the Supreme Court ruled that a state-court judge did not have "absolute immunity from a suit for damages under 42 U.S.C. § 1983 for his decision to dismiss a subordinate court employee." *Forrester v. White*, 484 U.S. 219, 220 (1988). The Court described its "absolute official immunity" jurisprudence as "quite sparing," citing as examples legislative immunity

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[5] The Office of Senator Dayton later filed an answer denying Hanson's allegations.

under the Speech or Debate Clause and Presidential immunity under *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). *Forrester*, 484 U.S. at 224-25.[6] Consistent with the narrowness of absolute immunity in these contexts, the Court explained that judges are entitled to absolute immunity only for "judicial acts," not "administrative, legislative, or executive functions," *id.* at 227, no matter how "essential" such functions may be "to the very functioning of the courts," *id.* at 228. The Court then concluded that the employment decision in *Forrester* was an administrative, not a judicial, act and that the state-court judge therefore was not entitled to absolute immunity. *Id.* at 229-30.

Gross v. Winter, 876 F.2d 165 (D.C. Cir. 1989), presented the question whether common law legislative immunity exempted a D.C. Councilmember's personnel decisions from judicial review. We recognized that *Browning*'s focus on "the duties of the employee" as the "ultimate issue" was "unquestionably [in] tension" with *Forrester*, "which accords no weight to the duties of the employee." *Winter*, 876 F.2d at 170 (quoting *Browning*, 789 F.2d at 928) (internal quotation mark omitted; emphasis removed). We found "*Forrester*, not *Browning*, controlling" and concluded that "the functions judges and legislators exercise in making personnel decisions affecting [probation offices and legislative aides, respectively] are administrative, not judicial or legislative." *Id.* at 172.

Now a conflict in the circuits has developed. In *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301

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[6] The Court characterized its decisions interpreting the Speech or Debate Clause as being "careful not to extend the scope of the [Clause's] protection further than its purposes require." 484 U.S. at 224. The Court described the President's absolute immunity as resting on the President's "'unique position in the constitutional scheme.'" *Id.* at 225 (quoting *Fitzgerald*, 457 U.S. at 749).

(10th Cir. 2004), *cert. denied*, 126 S. Ct. 396 (2005), a case brought under the Accountability Act, the Tenth Circuit held that the Speech or Debate Clause bars judicial review of a Senator's allegedly discriminatory personnel decision only when the plaintiff's claim "question[s] the conduct of *official* Senate legislative business." *Id.* at 1304 (emphasis added). The court was "hesita[nt] to embrace th[e] test" we employed in *Browning*, which it considered inconsistent with the Supreme Court's Speech or Debate Clause jurisprudence. *Id.* at 1318-19.

II.

The Accountability Act allows an employee of the House or Senate to recover damages and seek injunctive relief from a Member's personal office "alleged to have committed [a] violation [of the Accountability Act], or in which the violation is alleged to have occurred." 2 U.S.C. § 1408(b); *id.* § 1301(3), (9); *see, e.g., id.* §§ 1311(b)(1), 1312(b), 1313(b).[7] Congress thereby unequivocally waived the sovereign immunity of a Member's personal office facing such allegations. *See Lane v. Peña*, 518 U.S. 187, 192 (1996). Congress also provided in § 1413 that § 1408 "shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, [the Speech or Debate Clause] of the Constitution." The Accountability Act therefore does

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[7] After midnight of the first day of the 104th Congress, the House passed the Act with little debate and without a committee hearing or a committee vote; the Senate passed its version a few days later, again with scarcely any debate and no hearings; there was no conference committee; and even the Senate bill's sponsor lamented the lack of consideration given to this legislation. *See* James T. O'Reilly, *Collision in the Congress: Congressional Accountability, Workplace Conflict, and the Separation of Powers*, 5 GEO. MASON L. REV. 1, 3-4 (1996).

nothing to a Member's Speech or Debate Clause immunity, and we must determine how that immunity operates in suits under the Accountability Act.

The Speech or Debate Clause reinforces the separation of powers and protects legislative independence. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975) (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972); *United States v. Johnson*, 383 U.S. 169, 178 (1966)); *Gravel v. United States*, 408 U.S. 606, 616 (1972); *Powell v. McCormack*, 395 U.S. 486, 503 (1969); *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951).[8] As to the judicial branch, the Clause can protect Members "from inquiry into legislative acts or the motivation for actual performance of legislative acts," *Brewster*, 408 U.S. at 508, "from the burden of defending" certain suits, *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam), and "from the consequences of litigation's results," *id.* *See United States v. Helstoski*, 442 U.S. 477, 487, 489 (1979), *Doe v. McMillan*, 412 U.S. 306, 318 (1973); *Powell*, 395 U.S. at 502-03, 505; *Johnson*, 383 U.S. at 173; *Tenney*, 341 U.S. at 377. In each case, the Clause must be applied "in such a way as to insure the independence of the legislature without altering

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[8] The Speech or Debate Clause was adopted by the Founders "without discussion and without opposition." *Johnson*, 383 U.S. at 177; *see* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 378, 406 (Jonathan Elliot ed., 2d ed. William S. Hein & Co. 1996) (1891); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 246 (Max Farrand ed., 1966). The historical antecedents of the Clause are discussed in Justice Frankfurter's opinion for the Court in *Tenney*, 341 U.S. at 372-75, and in Justice Harlan's opinion for the Court in *Johnson*, 383 U.S. at 177-83. *See also Powell*, 395 U.S. at 502-03; *Gravel*, 408 U.S. at 652-59 (Brennan, J., dissenting); 2 THE FOUNDERS' CONSTITUTION 318-45 (Philip B. Kurland & Ralph Lerner eds., 1987).

the historic balance of the three co-equal branches of Government." *Brewster*, 408 U.S. at 508.

The parties accept these principles and urge us to resolve broad questions related to suits under the Accountability Act: can a Member's personal office invoke the Speech or Debate Clause on the Member's behalf, as legislative aides and committees can?[9] is a personal decision *always* an administrative act,[10] or could a personnel decision be a legislative act in certain circumstances?[11] and so forth. "These are perplexing questions. Their difficulty admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case[s]." *Whitehouse v. Ill. Cent. R.R. Co.*, 349 U.S. 366, 372-73 (1955); *see Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954). We therefore begin with the validity of our decision in *Browning*.

A.

The Speech or Debate Clause protects a Member's conduct if it is an integral "part of . . . the due functioning of the [legislative] process." *Brewster*, 408 U.S. at 516 (emphasis removed); *accord Gravel*, 408 U.S. at 625. The Clause obviously covers core legislative acts – "how [a Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee." *Brewster*, 408 U.S. at 526; *see also*

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[9] *See Gravel*, 408 U.S. at 616-18; *see also McMillan*, 412 U.S. at 312-13; *Tenney*, 341 U.S. 379.

[10] *Cf. Forrester v. White*, 484 U.S. 219, 228-29 (1988); *Gross v. Winter*, 876 F.2d 165, 170-72 (D.C. Cir. 1989).

[11] *Cf. Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Rateree v. Rockett*, 852 F.2d 946, 950-51 (7th Cir. 1988).

Bastien, 390 F.3d at 1314.[12] But the Supreme Court has long held that the Clause does more.[13] It protects acts that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. And the Clause provides further protection in precluding "inquiry . . . into the

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[12] *See, e.g., Gravel*, 408 U.S. at 625 ("The heart of the Clause is speech or debate in either House."); *Brewster*, 408 U.S. at 512 ("A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. . . . [T]he Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts."); *Kilbourn*, 103 U.S. at 204 (protecting "things generally done in a session of the House by one of its members in relation to the business before it"); *see also Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 31 (1808) ("[I]t must appear that some language or conduct of his, in the character of a representative, is the foundation of the prosecution, for in no other character can he claim the privilege.").

[13] Over the years, the Supreme Court has articulated a number of different formulations to describe what the Speech or Debate Clause protects. *See, e.g., Helstoski*, 442 U.S. at 489 ("The Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. It precludes any showing of how [a legislator] acted, voted, or decided." (alteration in original; citation and internal quotation marks omitted)); *U.S. Servicemen's Fund*, 421 U.S. at 501 ("The question to be resolved is whether the actions of the [Member] fall within the 'sphere of legitimate legislative activity.'" (footnote omitted)); *Johnson*, 383 U.S. at 180 ("[A] charge . . . that the Congressman's conduct was improperly motivated . . . is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry."); *Tenney*, 341 U.S. at 376 (inquiring "whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity"); *see also Coffin*, 4 Mass (1 Tyng) at 27 (protecting "every thing said or done by [a Member] in the exercise of the functions of that office").

motivation for" acts "that occur in the regular course of the legislative process." *Helstoski*, 442 U.S. at 489 (quoting *Brewster*, 408 U.S. at 525); *accord Johnson*, 383 U.S. at 180. In defining these categories of protected conduct, the Court has been careful not "to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process." *Brewster*, 408 U.S. at 516. The Speech or Debate Clause therefore "does not prohibit inquiry into illegal conduct simply because it has *some nexus* to legislative functions," *id.* at 528 (emphasis added), or because it is merely "related to," as opposed to "part of," the "due functioning" of the "legislative process," *id.* at 514 (emphasis removed).

Fields and Hanson contend that personnel decisions never can be "an integral part of the deliberative and communicative processes" in which Members engage as legislators, *Gravel*, 408 U.S. at 625, because personnel decisions never have more than merely "some nexus to legislative functions," *Brewster*, 408 U.S. at 528; *see id.* at 513-16. We agree that some personnel decisions would not qualify. The legislative process at the least includes "delivering an opinion, uttering a speech, or haranguing in debate";[14] proposing legislation;[15] voting on

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[14] *Tenney*, 341 U.S. at 374 (quoting *Coffin*, 4 Mass. (1 Tyng) at 27); *accord Brewster*, 408 U.S. at 526 (protecting "how [a Member] spoke, how he debated"); *see also Johnson*, 383 U.S. at 180 ("[T]he Speech or Debate Clause extends at least so far as to prevent [conspiring to give a speech in the House in exchange for remuneration] from being made the basis of a criminal charge against a member of Congress . . .."). This, of course, is obvious from the text of the Speech or Debate Clause. U.S. CONST. art I, § 6.

[15] *See Kilbourn*, 103 U.S. at 204 (protecting "resolutions offered"); *see also Brewster*, 408 U.S. at 526 (protecting "anything [a Member] did in the chamber or in committee"); *Tenney*, 341 U.S. at 374 (protecting "every

legislation;[16] making, publishing, presenting, and using legislative reports;[17] authorizing investigations and issuing subpoenas;[18] and holding hearings and "introducing material at Committee hearings."[19] Many personnel decisions by Members' personal offices lack even "some nexus," *Brewster*, 408 U.S. at 528, to these types of legislative acts. Firing an

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other act resulting from the nature, and in the execution, of the office") (quoting *Coffin*, 4 Mass. (1 Tyng) at 27).

[16] *See Brewster*, 408 U.S. at 526 (protecting "how [a Member] voted"); *Tenney*, 341 U.S. at 374 (protecting "the giving of a vote") (quoting *Coffin*, 4 Mass. (1 Tyng) at 27); *Kilbourn*, 103 U.S. at 204 (protecting "the act of voting, whether it is done vocally or by passing between the tellers").

[17] *See McMillan*, 412 U.S. at 312 ("[A] published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries."); *id.* at 313 (protecting "preparing a report where [the challenged materials] were reproduced, and authorizing the publication and distribution of that report"); *Tenney*, 341 U.S. at 374 (protecting "the making of a written report"); *Kilbourn*, 103 U.S. at 204 (protecting "written reports presented in [the legislative] body by its committees").

[18] *See U.S. Servicemen's Fund*, 421 U.S. at 504 ("The power to investigate and to do so through compulsory process plainly falls within [the definition of legislative activity]."); *id.* ("Issuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate."); *McMillan*, 412 U.S. at 313 (protecting the "act[] of authorizing an investigation pursuant to which the subject materials were gathered"); *Tenney*, 341 U.S. at 377 ("Investigations, whether by standing or special committees, are an established part of representative government.").

[19] *McMillan*, 412 U.S. at 312 ("[I]t is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief . . . for introducing material at Committee hearings . . ., for referring the Report that included the material to the Speaker of the House, and for voting for publication of the report."); *id.* at 313 (protecting the act of "holding hearings where the [challenged] materials were presented").

aide for falsifying expense reports, or disciplining an assistant for harassing others in the office is "not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator." *Brewster*, 408 U.S. at 526.

Browning nevertheless held that the Speech or Debate Clause protects those personnel decisions taken with respect to employees whose duties are "directly related to the due functioning of the legislative process." *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, 929 (D.C. Cir. 1986) (emphasis removed). We now see that an employee's duties are too crude a proxy for protected activity. Our holding in *Browning* presumes that a personnel decision with regard to an employee whose duties are "directly related to the due functioning of the legislative process," *Browning*, 789 F.2d at 929 (emphasis removed), is always "an integral part of the deliberative and communicative processes," *Gravel*, 408 U.S. at 625. But the presumption is, at a minimum, overinclusive and therefore inconsistent with the Court's practice of being "careful not to extend the scope of the protection further than its purposes require." *Forrester v. White*, 484 U.S. 219, 224 (1988). Any number of counter-examples reveal as much: a legislative aide may be discharged because of budgetary cutbacks; a staff member may be demoted solely for consistent tardiness; a person seeking a top-level staff position might be rejected for having a poor college transcript; and so forth. That the person targeted by the personnel decision performs duties "directly related to . . . the legislative process," *Browning*, 789 F.2d at 929 (emphasis removed), is not enough – conduct must be "part of," not merely "related to," the "due functioning" of the "legislative process" to be protected by the Speech or Debate Clause, *Brewster*, 408 U.S. at 514. At best, that an employee's duties are directly related to the legislative process establishes merely "some nexus" between the personnel decision and that process. *Brewster*, 408 U.S. at 528; *see*

Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 415 (D.C. Cir. 1995). We therefore reject *Browning*'s test for determining when a legislator's personnel decision is protected by the Speech or Debate Clause.

The Office of Senator Dayton defends *Browning* on the ground that "[d]irecting one's alter egos" – that is, legislative aides with duties directly related to the legislative process, *see Gravel*, 408 U.S. at 616-17 – necessarily "is an integral part of the processes of achieving one's legislative goals," because of the duties such employees perform. Br. for Appellant Office of Senator Dayton 20. We see several problems with this formulation. The Speech or Debate Clause protects conduct that is integral to the legislative *process*, not a Member's legislative *goals*. It may be integral to a Member's legislative goals – indeed, integral even to accomplishing his "constitutionally delegated duties," *id.* – to send newsletters to constituents or deliver speeches outside of Congress to generate support for prospective legislation. But such acts are "political," not "legislative," and therefore not protected by the Speech or Debate Clause. *Brewster*, 408 U.S. at 512; *see Proxmire*, 443 U.S. at 131. Another problem with the formulation lies in its assumption that a Member only directs his alter egos with regard to constitutionally protected activities. "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 625. Legislative aides are no different.[20]

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[20] We have recognized that a "Member's ability to do his job as a legislator effectively is tied . . . to the Member's relationship with the public and in particular his constituents and colleagues in the Congress." *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006). While there is no doubt a "clear nexus" between a personnel decision involving an employee with legislative duties and the Member's "ability to

The Office of Senator Dayton also relies on *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) – the presidential immunity case – to defend *Browning*. In *Fitzgerald*, the Supreme Court relied on separation of powers principles to grant the President "absolute . . . immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id.* at 756. It is true that both legislative and presidential immunity are animated by separation of powers principles. But this does not mean that the immunities are coextensive. The President's immunity is based on his "unique position in the constitutional scheme," *id.* at 749, and the "singular importance of the President's duties," *id.* at 751. The Court therefore approaches presidential immunity differently. *Id.* at 749; *see Forrester*, 484 U.S. at 224-25; *Bastien*, 390 F.3d at 1317. Legislative immunity under the Speech or Debate Clause is limited to matters that are part of, or integral to, the due functioning of the legislative process. It is not enough that a Member's conduct is within the outer perimeter of the legislative process. *Cf. Brewster*, 408 U.S. at 513-16, 528.[21]

B.

Without *Browning*, we are left with the question how the district court should evaluate the Member Offices' claims to Speech or Debate Clause immunity in these suits.

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carry out his representative responsibilities effectively," *id.* at 665-66, a "nexus" alone is insufficient to trigger the protections of the Speech or Debate Clause, *Brewster*, 408 U.S. at 528.

[21] There are other differences. Presidential immunity, for instance, "does not extend indiscriminately to the President's personal aides or to Cabinet level officers," *Forrester*, 484 U.S. at 225 (citations omitted), while Speech or Debate Clause immunity may be invoked by a Member's "aides insofar as the[ir] conduct . . . would be a protected legislative act if performed by the Member himself," *Gravel*, 408 U.S. at 618.

The Speech or Debate Clause operates as a jurisdictional bar when "the actions upon which [a plaintiff] sought to predicate liability were 'legislative acts.'" *McMillan*, 412 U.S. at 318 (quoting *Gravel*, 408 U.S. at 618). To determine on what actions a plaintiff sought to predicate liability, we examine the pleadings. *See id.* at 312 (finding it "plain . . . that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief" for conduct protected by the Clause); *Tenney*, 341 U.S. at 376 (inquiring "whether from the pleadings it appears that the [legislators] were acting in the sphere of legitimate legislative activity."); *see also Brewster*, 408 U.S. at 525 (examining the face of the indictment to determine whether "inquiry into legislative acts or motivation for legislative acts is necessary . . . to make out a prima facie case"). In these cases, it does not appear from Fields's or Hanson's complaints that either sought to predicate liability on protected conduct. Fields alleges that the Office of Representative Johnson discriminated against her because of her race and gender and retaliated against her when she objected to discriminatory treatment of her co-worker, Elisabeth Howie, and when she filed a complaint with the Office of Compliance. Hanson alleges that Senator Dayton himself discriminated against him because of his heart condition and that the Office of Senator Dayton denied him deserved overtime compensation. In neither case is it "necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation" of the Accountability Act. *Brewster*, 408 U.S. at 526; *compare Bastien*, 390 F.3d at 1315-16.[22]

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[22] Because the complaints are not predicated on legislative acts, Judge Brown's concurrence is mistaken in thinking it necessary to decide whether the defendant – that is, the personal office of the Member – is equivalent to the Member for the purpose of invoking the jurisdictional bar of the Speech

But the fact that Fields and Hanson are able to plead prima facie cases under the Accountability Act without violating the Speech or Debate Clause does not mean the Speech or Debate Clause in no way hinders their suits. When the Clause does not preclude suit altogether, it still "protect[s] Members from

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or Debate Clause. To prove the lack of equivalency in the abstract – which misapplies the law for the reasons Judge Tatel gives in his separate opinion – Judge Brown writes that "nothing in the Act suggests that the member can make final litigation decisions on behalf of the employing office." Op. of Judge Brown 15. This is not only irrelevant but impossible. Litigation decisions are made by the client, on the advice of counsel. The attorney representing the Member's office is not a free agent. His client is the personal office of the Member, which consists of the Member and his staff. Who is in charge of the office and who makes the decisions for the office? The Member of course.

Judge Brown argues that a Member's personal office cannot invoke the Clause on the Member's behalf because it "is not a person, nor a sovereign government, nor a branch of government, nor an agency created by statute, nor a chartered corporation, nor a trust, nor a partnership." Op. of Judge Brown 12. The same could be said of congressional committees, which fall within the Accountability Act's definition of "employing office." 2 U.S.C. § 1301(9). Yet the Supreme Court has held that legislative committees may invoke the Clause. *See Tenney*, 341 U.S. at 379. Precedent in this circuit is to the same effect. *See Consumers Union v. Periodical Correspondents Ass'n*, 515 F.2d 1341 (D.C. Cir. 1975). Judge Brown cannot square her position with *Tenney*, which the Supreme Court treats as a Speech or Debate Clause case, *Powell*, 395 U.S. at 501, or with *Consumers Union*.

Judge Brown also thinks it significant that "an employee in the personal office of a member is in truth an employee of *Congress*" because salary payments are administered centrally by the Secretary of the Senate and the Chief Administrative Officer of the House of Representatives. *See* Op. of Judge Brown 12-13. That is also true of legislative aides, who are able to invoke the Clause in certain circumstances, *see Gravel*, 408 U.S. at 621-22 – indeed it is true even of Members. These matters, as well as the exceedingly odd idea that a Member's staffing decisions are made "on behalf of Congress" rather than the Member, Op. of Judge Brown 12, simply have no bearing on the issues before us.

inquiry into legislative acts or the motivation for actual performance of legislative acts." *Brewster*, 408 U.S. at 508; *Brown & Williamson*, 62 F.3d at 415 n.5 ("Even when properly subject to suit, members of Congress are privileged against the evidentiary use against them of any legislative act, even if the act is not claimed to be itself illegal, but is offered only to show motive . . .." (citing *Helstoski*, 442 U.S. at 487-89); *Brewster*, 408 U.S. at 527; *Johnson*, 383 U.S. at 169)). This evidentiary privilege includes a "testimonial privilege." *Brown & Williamson*, 62 F.3d at 418. A Member "may not be made to answer" questions – in a deposition, on the witness stand, and so forth – regarding legislative activities. *Gravel*, 408 U.S. at 616; *see Brown & Williamson*, 62 F.3d at 418-21. "Revealing information as to a legislative act . . . to a jury" – whether by testimony or other evidence – "would subject a Member to being 'questioned' in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause." *Helstoski*, 442 U.S. at 490.

Thus, even if the challenged personnel decisions are not legislative acts, inquiry into the motivation for those decisions may require inquiry into legislative acts. For example, interactions with legislative staff (which may form part of the basis for personnel actions) are often part of the due functioning of the legislative process. The Supreme Court recognized this in *Gravel* when it approved an order that, among other things, "forbade questioning any witness including [a congressional aide] . . . concerning communications between the Senator and his aides during the term of their employment and related to [a particular] meeting or any other legislative act of the Senator." *Gravel*, 408 U.S. at 628-29 (footnote omitted).

The Speech or Debate Clause therefore may preclude some relevant evidence in suits under the Accountability Act."[23]

Most of the claims in these suits allege discrimination and, absent direct evidence of discrimination, are subject to the framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[24] That framework – under which a plaintiff proves a prima facie case of discrimination, which the employer rebuts by producing evidence that its conduct was nondiscriminatory, which the plaintiff then seeks to demonstrate is pretextual, *see Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981) – presents special

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[23] Judge Brown's concurrence states that "there is little reason to believe that allowing these suits to proceed will threaten legislative independence or unduly involve the judicial branch in the affairs of the legislative branch." Op. of Judge Brown 16. This speculation has no basis in reality. The Accountability Act authorizes suits based on conduct occurring in a Member's personal office, *see* 2 U.S.C. § 1408(b), which necessarily calls into question the actions of Members or their aides.

[24] Fields alleges racial and gender discrimination in violation of 2 U.S.C. § 1311, which incorporates § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, to which the *McDonnell Douglas* framework applies, *see McDonnell Douglas Corp.*, 411 U.S. at 802. She also alleges retaliation under 2 U.S.C. § 1317(a), to which the *McDonnell Douglas* framework presumably applies. *See Broderick v. Donaldson*, 437 F.3d 1226, 1231-32 (D.C. Cir. 2006). Hanson alleges disability discrimination in violation of 2 U.S.C. § 1311(a)(3), which incorporates § 501 of the Rehabilitation Act, 29 U.S.C. § 791, and §§ 10[illegible] of the Americans With Disabilities Act, 42 U.S.C. §§ 12112-12114, both of which are subject to the *McDonnell Douglas* framework. *See Barth v. Gelb*, 2 F.3d 1180, 1185-86 (D.C. Cir. 1993) (Rehabilitation Act); *Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir. 2001) (en banc) (Disabilities Act).

problems in the context of the Speech or Debate Clause.[25] Liability for discriminatory personnel decisions rests not on the fact that action was taken ("you can't *fire* me"), nor on the duties of the employee against whom action was taken ("you can't fire the chief of staff"), but on the reason that action was taken ("you can't fire me *for that reason*"). But what happens when the action was motivated by the employee's participation in the legislative process?

Suppose a plaintiff sues a Member's personal office claiming her discharge violated the Accountability Act. Suppose further that she is able to make out a prima facie case of discrimination of one form or another. If the employing office produces evidence – by affidavit, for example – that the personnel decision was made because of the plaintiff's poor performance of conduct that is an integral part of "the due functioning of the [legislative] process," *Brewster*, 408 U.S. at 516 (emphasis removed), then for the plaintiff to carry her burden of persuasion, she must "demonstrate that the proferred reason was not the true reason for the employment decision," *Burdine*, 450 U.S. at 256; *see also Smith v. District of*

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[25] Not all of the claims in the complaints allege discrimination. Fields and Hanson both allege violations of 2 U.S.C. § 1313, which incorporates certain provisions of the Fair Labor Standards Act, but to which the *McDonnell Douglas* framework does not apply. *See, e.g., Thompson v. Sawyer*, 678 F.2d 257, 270-71 (D.C. Cir. 1982) (discussing equal pay discrimination in violation of 29 U.S.C. § 206(d)); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) (discussing burden allocation in suits seeking overtime compensation under the Fair Labor Standards Act). (Hanson also alleges a nondescript violation of 2 U.S.C. § 1312, which incorporates §§ 101-105 of the Family and Medical Leave Act, 29 U.S.C. §§ 2611-2615, but the complaint does not give sufficient detail to know whether the *McDonnell Douglas* framework will apply to this claim.) Nondiscrimination claims such as these, which may give rise to liability regardless of the employer's motivation, are unlikely to present the problems discussed above.

Columbia, 430 F.3d 450, 455-56 (D.C. Cir. 2005); *Murray v. Gilmore*, 406 F.3d 708, 713 (D.C. Cir. 2005). In many cases, the plaintiff would be unable to do so without "draw[ing] in question" the legislative activities and the motivations for those activities asserted by the affiant – matters into which the Speech or Debate Clause prohibits judicial inquiry. *Brewster*, 408 U.S. at 526 (quoting *Johnson*, 383 U.S. at 185); *see also Helstoski*, 442 U.S. at 490. For example, if a Senator claimed to have fired an employee because speeches the employee wrote did not accurately reflect the Senator's legislative objectives, the Speech or Debate Clause would preclude the employee from proving her case by demonstrating that the speeches she wrote did in fact accurately reflect the Senator's legislative objectives. In such a case, if the evidence ultimately bore out the affiant's account of the plaintiff's discharge, then the very inquiry leading to that conclusion would be unconstitutional. *See Helstoski*, 442 U.S. at 489 ("The Clause protects 'against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.' . . . [R]eferences to past legislative acts of a Member cannot be admitted without undermining the values protected by the Clause." (quoting *Brewster*, 408 U.S. at 525)).

In employment discrimination cases under the Accountability Act, then, as in any other employment discrimination case, the defendant will provide evidence of a legitimate nondiscriminatory reason for the discharge. To invoke the Speech or Debate Clause, the employing office should include with this evidence an affidavit from an individual eligible to invoke the Speech or Debate Clause recounting facts sufficient to show that the challenged personnel decision was taken because of the plaintiff's performance of conduct protected by the Speech or Debate Clause. The affiant must have personal knowledge of the facts underlying his averment and otherwise must be able to assert a

Member's Speech or Debate Clause immunity. *See Gravel*, 408 U.S. at 618; *see also id.* 622 n.13 ("[A]n aide's claim of privilege can be repudiated and thus waived by the Senator.")[26] The affidavit must indicate into what "legislative activity" or into what matter integral to the due functioning of the legislative process the plaintiff's suit necessarily will inquire.

With that submission, the district court must then determine whether the asserted activity is in fact protected by the Speech or Debate Clause. If it is, the action most likely must be dismissed, as the failure to rebut a defendant's evidence with "evidence . . . that the[] proferred justifications were mere pretext" normally is fatal to a plaintiff's discrimination allegations. *Smith*, 430 F.3d at 455-56. If the lawsuit does not inquire into legislative motives or question conduct part of or integral to the legislative process, or if the district court determines that the asserted activity is not in fact part of or integral to the legislative process, then the case can go forward. *Cf. Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360-61 (D.C. Cir. 1990) (noting, in a different context, that where inquiry into a matter was forbidden "even for the purpose of showing it to be pretextual," the claim need not be dismissed because "it may turn out that the potentially mischievous aspects . . . are not contested . . . or are subject to entirely neutral methods of proof" and "[o]nce evidence is offered, the district court will be in a position to control the case"). We need not decide today whether a case in which the plaintiff uses evidence unrelated to legislative acts – such as direct evidence of discrimination or evidence that at the time of discharge the Senator offered a different reason for the employment action from the one alleged

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[26] A plaintiff therefore may challenge a defendant's eligibility to invoke the Speech or Debate Clause by arguing that the predicates for doing so under *Gravel* are not satisfied.

in the affidavit – to demonstrate that the defendant's legislative explanation is pretext requires more questioning of the defendant's legislative motives than the Speech or Debate Clause allows. We merely note that a plaintiff who seeks to prevail by quarreling with the defendant's statements about activity protected by the Speech or Debate Clause must fail.

We recognize that in operating this way the Clause effectively may preclude a plaintiff's discrimination suit. But this does not deprive the Accountability Act of all force, as Fields and Hanson suggest. Just as "a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts," *Brewster*, 408 U.S. at 512, so too a Member's personal office may be liable under the Accountability Act for misconduct provided that the plaintiff can prove his case without inquiring into "legislative acts or the motivation for legislative acts," *id.* And a plaintiff whose suit cannot proceed in federal court by operation of the Speech or Debate Clause still may avail himself of the Accountability Act's administrative complaint procedure. *See* 2 U.S.C. § 1405.

Accordingly, we now reject the *Browning* framework and affirm the judgments below because the Speech or Debate Clause does not bar jurisdiction in these cases.

Affirmed.

ROGERS, J., *concurring in part and in the judgment*: For reasons stated in the opinions of Judge Randolph and Judge Brown, I agree that the employee-duties test of *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), is overbroad and must be rejected. *See* Op. of Judge Randolph 17-20; Op. of Judge Brown 9-10.

I also agree that the Speech or Debate Clause does not pose a jurisdictional bar to Fields' and Hanson's lawsuits under the Congressional Accountability Act ("CAA"). Neither the history of the Clause nor Supreme Court precedent provides a basis on which to conclude that personnel decisions are "legislative acts" because, even when motivated by legislative considerations, the personnel decisions themselves are not "an integral part of the deliberative and communicative processes by which Members participate in [congressional] proceedings." *Gravel v. United States*, 408 U.S. 606, 625 (1972); *see Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1315 (10th Cir. 2004); *cf. Forrester v. White*, 484 U.S. 219, 229 (1988). Further, consistent with Supreme Court jurisprudence indicating the court should examine the pleadings to determine "whether it is necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute," *United States v. Brewster*, 408 U.S. 501, 526 (1972), an examination of the complaints makes clear that neither plaintiff must rely on legislative acts to make a *prima facie* case. *See* Op. of Judge Randolph 20-21.

I further agree that the Clause's evidentiary privilege, *see, e.g., United States v. Helstoski*, 442 U.S. 477, 487-90 (1979), has a role to play. *See* Op. of Judge Randolph 22-23; Op. of Judge Brown 19; Op. of Judge Tatel 3. Defining that role presents potentially difficult questions, particularly as the Supreme Court has yet to speak to the question in this context,

and its statements in other contexts can be understood to point in different directions, as the opinions of Judge Randolph and Judge Brown reflect. *Compare* Op. of Judge Randolph 25-26 (citing *Helstoski*, 442 U.S. at 489-90), *with* Op. of Judge Brown 20-21 (citing *Gravel*, 408 U.S. at 629 n.18).

For the reasons stated in Judge Brown's opinion, it is tempting to interpret the unique statutory scheme created by Congress in the CAA in a manner that allows discrimination and other claims to proceed against the Member's personal office largely unfettered by the protections afforded by the Speech or Debate Clause when Members or their alter egos are personally sued, *see* Op. of Judge Brown 11-17, 21; *see also* Op. of Judge Tatel 4. But Supreme Court jurisprudence has yet to so limit the reach of the Clause. *See* Op. of Judge Randolph 12-13 (citing cases); Op. of Judge Tatel 4. Nevertheless, it is not self-evident that the Clause's safeguards of legislative independence would be threatened by an approach that permitted CAA suits such as those before us to proceed subject only to protection of evidence of legislative acts produced by Members and their alter egos upon proper invocation of the privilege.

Because these are appeals of denials of motions to dismiss under Federal Rule of Civil Procedure 12(b)(1), the court need not address what happens when legislative acts arise as potential evidence in varying contexts in CAA litigation. It is unclear whether or precisely how these questions may arise upon the remand of the cases on appeal. The court would benefit from briefing based on the application of the evidentiary privilege by the district court in a particular context. Attempts to signal the answers to such questions are fraught with problems. Hence, I would leave open the question of how the Clause may limit evidence offered by parties in CAA litigation

and whether the role of the Member's personal office as the defendant under the CAA affects the application of the Clause.

Accordingly, I join Judge Randolph's opinion to the extent it is consistent with the views I have expressed.

TATEL, *Circuit Judge, concurring*: Though disappointed at our failure to reach consensus in this important case, I take some solace from the fact that the commonalities of our opinions exceed their differences—differences that relate to questions more easily answered after further factual development. I write separately to point out the commonalities, to briefly discuss the differences, and to suggest how the cases should proceed on remand.

First, the commonalities. All of us agree that *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 939 (D.C. Cir. 1986), extends further than the Speech or Debate Clause requires. *See* Op. of Judge Randolph 17; Op. of Judge Brown 10; Op. of Judge Rogers 1. All of us also agree, however, that the Speech or Debate Clause still has some role to play in employment discrimination cases, Op. of Judge Randolph 22; Op. of Judge Brown 19; Op. of Judge Rogers 1; and that the question of what precisely the Clause precludes is best resolved on a case-by-case basis, Op. of Judge Randolph, 25-27; Op. of Judge Brown 21; Op. of Judge Rogers 2-3. And all of us agree that the two district court orders should be affirmed.

What, then, divides us? After dispensing with *Browning*, the two principal opinions diverge. Judge Randolph's opinion for the court holds that because neither of the cases before us rests on legislative acts, we have no basis for dismissing them. Judge Randolph then points out that the Speech or Debate Clause may preclude some evidence, that in many employment cases it may preclude the very evidence upon which plaintiffs seek to rely, and that if it does, the suit may not proceed. The principal concurrence focuses on whether the defendant functions as a Member's alter ego, arguing that wide variations in Speech or Debate Clause protection hinge on the answer to that question. This approach would apply one version of the

Speech or Debate Clause if the defendant is a Member's alter ego and another if the defendant is not.

Not only do I find this distinction unworkable, but I do not understand what it means for a defendant to "be" a Member's alter ego. No one acts as a Member's alter ego all the time: even a Member's primary legislative aide does not act as the Member's alter ego when brushing her teeth. Whether an aide acted as a Member's alter ego turns on the particular *act* the aide performed on the Member's behalf. Reinforcing this point, *Gravel v. United States*, the first case to have used the term "alter ego," focuses on the aide's actions: "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the *conduct* of the latter would be a protected legislative act if performed by the Member himself." 408 U.S. 606, 618 (1972) (emphasis added); *see also id.* at 621-22 ("the privilege applicable to the aide [must be] viewed . . . as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf, and . . . in all events the privilege available to the aide is confined to those *services* that would be immune legislative *conduct* if performed by the Senator himself" (footnote omitted) (emphasis added)); *id.* at 622 (noting that an aide can testify "at trials or grand jury proceedings involving third-party crimes" only if "the questions do not require testimony about or impugn a legislative act").

Of course, the person who performed the challenged action and the defendant in the litigation are often the same person (e.g., if the aide faces criminal or civil liability), so it is a convenient shorthand to say that only an alter ego can exercise the privilege to preclude litigation about particular conduct. But that shorthand refers to whether the person acted as the Member's alter ego when performing the (possibly) legislative act at issue, not to whether the aide "is" an alter ego at the time of the litigation. Even language from *Gravel*, upon which the

principal concurrence relies, comes from a section of the opinion emphasizing the conduct at issue over the defendant's identity. The statement "relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act," *id.* at 621, *quoted in* Op. of Judge Brown 20, appears in a paragraph beginning "[n]one of these three cases [*Kilbourn v. Thompson*, 103 U.S. 168 (1881), *Dombrowski v. Eastland*, 387 U.S. 82 (1967), and *Powell v. McCormack*, 395 U.S. 486 (1969)] adopted the simple proposition that immunity was unavailable to congressional or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection," *Gravel*, 408 U.S. at 620.

Focusing on particular actions rather than on the defendant's "status" as an alter ego suggests a simple rule: no Member or alter ego can be held liable for the performance of a legislative act. As Judge Randolph points out, however, these cases to not implicate that rule because neither Fields nor Hanson must prove the performance of a legislative act in order to prevail. Op. of Judge Randolph 20-21.

But the Speech or Debate Clause does not end there. We all agree that the Clause also precludes introduction of certain evidence and that this aspect of the privilege will come into play in these cases if a Member or an appropriate aide asserts it. *See id.* at 26 ("The affiant . . . must be able to assert a Member's Speech or Debate Clause immunity."); Op. of Judge Brown 21 ("[T]he Clause functions only as a testimonial and documentary privilege, to be asserted by members and qualified aides if they are called upon to produce evidence."). Still, we differ on how broad a role the Clause plays. The principal concurrence suggests that so long as aides neither producing the evidence nor defending the case, litigation can center on the

motivation for legislative acts. *See* Op. of Judge Brown 20-22. According to Judge Randolph, the Speech or Debate Clause precludes litigation in which a plaintiff seeks to meet the *McDonnell Douglas* burden by challenging the veracity of an aide's testimony about the motivation for legislative acts. *See* Op. of Judge Randolph 23-27 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Because judicial assessment of the aide's testimony would constitute "inquiry into legislative acts or the motivation for actual performance of legislative acts," *United States v. Brewster*, 408 U.S. 501, 509 (1972), I agree with Judge Randolph.

To be sure, I might prefer a more limited view of the Speech or Debate Clause's reach were I writing on a blank slate, but several Supreme Court decisions make clear that we must tread carefully in this area. *See* Op. of Judge Randolph 12 (citing cases). Indeed, "[r]ather than giving the [Speech or Debate] Clause a cramped construction, the [Supreme] Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel*, 408 U.S. at 618. For this reason, I believe we must leave it to the Supreme Court to narrow the Speech or Debate Clause's reach. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should . . . leav[e] to [the Supreme] Court the prerogative of overruling its own decisions.").

Thus, although I agree that suits against congressional offices—as authorized by the Congressional Accountability Act—place less pressure on Members than would suits against Members personally, I cannot agree that the Clause's protection extends only to cases in which Members (or their aides) are witnesses or defendants. Nor do I share the principal concurrence's confidence that CAA cases will not "unduly

involve the judicial branch in the affairs of the legislative branch." Op. of Judge Brown 16. Certainly the language from *Gravel* upon which the principal concurrence relies—"We do not intend to imply . . . that in no grand jury investigations or criminal trials of third parties may third-party witnesses be interrogated about legislative acts of Members of Congress," *Gravel*, 408 U.S. at 629 n.18, *quoted in* Op. of Judge Brown 20—stands for no such proposition; *Gravel* states only that *some* testimony about legislative acts by third-party witnesses *may* be admissible, not that *all* such testimony *is* admissible.

For these reasons, I join Judge Randolph's opinion. Still, I emphasize that despite our differences, we all agree that on remand the district courts must determine whether particular aspects of these two cases implicate Speech or Debate Clause concerns. In my view, the district courts should focus on determining whether the cases may proceed without undue judicial "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *Brewster*, 408 U.S. at 525. Because such determinations will necessarily be fact-bound, it is appropriate that we announce no blanket rule today. Once the district courts develop the factual records, the issues that divide this court may become clearer.

BROWN, *Circuit Judge, with whom* SENTELLE *and* GRIFFITH, *Circuit Judges, join, concurring in the judgment*: The Congressional Accountability Act of 1995 (the "Act"), 2 U.S.C. §§ 1301-1438, was the first legislation of the 104th Congress, adopted in the Senate by a vote of 98 to 1, and adopted unanimously in the House. Section 102(a) of the Act lists several federal laws that "shall apply . . . to the legislative branch of the Federal Government," including (1) the Fair Labor Standards Act of 1938, (2) Title VII of the Civil Rights Act of 1964, (3) the Americans with Disabilities Act of 1990, (4) the Age Discrimination in Employment Act of 1967, (5) the Family and Medical Leave Act of 1993, and (6) the Occupational Safety and Health Act of 1970. 2 U.S.C. § 1302(a). President Clinton described the Act as "a reform that requires Congress to live under the laws it imposes on the American people," commenting that "Washington has too often isolated itself from the every day experience of ordinary Americans." Remarks on Signing the Congressional Accountability Act of 1995, 31 Weekly Comp. Pres. Doc. 91, 91 (Jan. 22, 1995). In these cases, we address whether, and in what circumstances, the defendant in an action brought pursuant to the Act may assert the Speech or Debate Clause as a jurisdictional bar, thereby requiring summary dismissal of the action.

Our determination of this issue calls into question the framework we articulated in *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984), and *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), concerning applicability of the Speech or Debate Clause in employment litigation involving congressional employees. I conclude that the rule stated in those cases distorts the Speech or Debate Clause beyond its natural contours, and therefore I, too, would repudiate it and refocus our analysis on the terms of the Constitution and the relevant statements of the Supreme Court,

but I would approach the case in a somewhat different way than Judge Randolph.

I

A

Fields v. Office of Eddie Bernice Johnson, Employing Office, United States Congress, No. 04-5315: From January 2002 until March 2004, Beverly Fields was the chief of staff in the congressional office of Eddie Bernice Johnson, a member of the United States House of Representatives. On June 3, 2004, Fields brought an employment discrimination action under the Act, naming the "Office of Eddie Bernice Johnson" as the defendant as section 408 of the Act requires. *See* 2 U.S.C. § 1408. In her amended complaint, Fields claims the office actively sought an Asian person under the age of forty to replace a dark-skinned Latino employee. When the office selected a suitable Asian employee, it terminated the Latino employee, giving the employee only one day's notice. Fields objected and asked the office to allow the Latino employee to continue working for two more months, but the office allegedly rejected this request. About the same time, according to the complaint, the office began efforts to replace Fields, who is African American, with a white man. To that end, the office allegedly made false accusations against Fields regarding her job performance and her relationships with coworkers and then demoted Fields by taking away her supervisory responsibilities. Fields claims the demotion was based on her race and gender and that it was also in retaliation for her having intervened on behalf of the Latino employee. In addition, Fields alleges discrimination in regards to pay. Finally, Fields claims the office initiated a bad faith investigation of her conduct as an employee, seeking thereby to force her to resign, and when Fields refused to resign, the office allegedly terminated her.

Fields claims the investigation and subsequent termination were retaliatory.

The office moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1), claiming lack of jurisdiction based on the Speech or Debate Clause. According to a declaration filed by the office, Fields was integrally involved in executing Johnson's legislative agenda. Though many of her duties were administrative, Fields was also involved in formulating legislative strategy, advising Johnson on how to vote, approving Johnson's floor statements, drafting legislation, and conferring with staff of other legislative offices about various legislative initiatives.

On August 25, 2004, the district court denied the motion to dismiss in a two-line order, which stated no reasons, and on August 27, 2004, the office filed this interlocutory appeal.

B.

Hanson v. Office of Senator Mark Dayton, No. 04-5335: From January 2001 until September 2002, Brad Hanson held various positions in the congressional office of Mark Dayton, a member of the United States Senate. Throughout this time, Hanson was located in Fort Snelling, Minnesota. On May 29, 2003, Hanson brought an employment discrimination action under the Act, naming the "Office of Senator Mark Dayton" as the defendant. *See* 2 U.S.C. § 1408. In his complaint, Hanson claims he was hired as a "State Office Manager." His job allegedly involved setting up three local offices in Minnesota and overseeing a "Health Care Help Line," which assisted people with their healthcare coverage problems. He alleges he worked considerable overtime, for which he was not paid. In 2002, according to the complaint, Hanson developed a medical condition that required surgery and a few weeks' recovery time.

Hanson claims he met with Dayton on July 3, 2002, to tell Dayton of his need for this surgery. Five minutes into the meeting, Dayton allegedly said, "You're done," and he told Hanson he should no longer report to the office and should instead go on immediate medical leave. On July 17, 2002, a senior staff member allegedly called Hanson at home and told him he would be terminated as of September 30, 2002. The complaint alleges Dayton fired Hanson because Hanson needed time off to recover from surgery, in violation of the Family and Medical Leave Act of 1993, and also because Dayton erroneously perceived Hanson to be disabled, in violation of the Americans with Disabilities Act of 1990. The complaint further alleges that the failure to compensate Hanson for overtime violated the Fair Labor Standards Act of 1938.

The office moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1), claiming lack of jurisdiction based on the Speech or Debate Clause. According to a declaration filed by the office, Hanson's work included meeting with constituents, briefing the Senator on constituent concerns regarding healthcare and law enforcement, overseeing the "Health Care Help Line," and identifying possible legislative initiatives. The declaration asserts that Hanson's work enabled him to identify a problem regarding reimbursements to ambulance service providers, and it claims Hanson was part of a team that investigated this problem and advised Dayton, proposing legislative solutions. As a result of this advice, Dayton introduced a bill entitled the Medicare Ambulance Payment Reform Act of 2001, and Dayton also initiated a committee hearing to address this issue. The declaration states that Hanson helped plan the committee hearing, selected topics and witnesses, and developed questions for Dayton to ask at the hearing.

Hanson responded to this declaration with his own declaration stating that the office "exaggerates my role in legislation" and "[o]verall, I estimate that I did not spend more than five percent of my time on the type of legislative duties described in Senator Dayton's motion."

On September 7, 2004, the district court denied the motion to dismiss in a minute order, which stated no reasons, and on September 21, 2004, the office filed this interlocutory appeal.

C

In most circumstances, our jurisdiction to hear appeals from district court orders only extends to "final decisions," 28 U.S.C. § 1291. Under the collateral order doctrine, we also have jurisdiction to hear immediate appeals of certain interlocutory orders, *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), namely those orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Such orders must "present[] a serious and unsettled question" to be immediately appealable. *Cohen*, 337 U.S. at 547. "[T]he denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). This framework applies to claims of immunity under the Speech or Debate Clause. *See, e.g., Helstoski v. Meanor*, 442 U.S. 500, 506 (1979). Because we have not yet had occasion to determine whether the personal offices of members of Congress may assert the protections of the Speech or Debate Clause, these cases present "serious and unsettled" questions

arising out of "substantial" claims of absolute immunity. We therefore have jurisdiction to consider these appeals under the collateral order doctrine.

II

The Constitution provides: "[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The historical record does not indicate any debate or controversy with respect to this provision. Very similar provisions appear in the Articles of Confederation and the English Bill of Rights of 1689. The Clause has its roots in centuries of struggle between the English Parliament and the Crown—struggle that sometimes erupted in armed conflict, with both Parliament and the Crown commanding independent armies. In more than one instance, royal troops arrested or attempted to arrest members of Parliament in reaction to speeches made and actions taken in Parliament. Coming in response to these confrontations, the Bill of Rights of 1689 established a bedrock legal foundation for the freedom of ideas within Parliament. Nearly a hundred years later, the Speech or Debate Clause established the same principle in American government. As the Supreme Court has explained, "the purpose of the Speech or Debate clause is . . . to preserve the independence and thereby the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 524 (1972).

> [T]he privilege was . . . born primarily of a desire . . . to prevent intimidation by the executive and accountability before a possibly hostile judiciary . . . There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum . . . is the predominate thrust of the Speech or Debate Clause.

United States v. Johnson, 383 U.S. 169, 181-82 (1966).

The Supreme Court first interpreted the Speech or Debate Clause in *Kilbourn v. Thompson*, 103 U.S. 168 (1881). *Kilbourn* involved a false imprisonment claim based on the plaintiff's arrest by the Sergeant at Arms of the House of Representatives. *Id.* at 170. The Sergeant at Arms was acting pursuant to a contempt finding of the House, *id.*, at 176-77, but the Supreme Court ruled the contempt finding improper, *id.* at 199-200. While the Court allowed the false imprisonment action against the Sergeant at Arms to proceed, it concluded that House *members* could claim immunity under the Speech or Debate Clause. *Id.* at 200-05. The Court adopted a principle of liberal construction as regards the Clause, extending its scope to legislative votes, reports, committee proceedings, and "'everything said or done . . . as a representative, in the exercise of the functions of that office.'" *Kilbourn*, 103 U.S. at 203 (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)).

Though *Kilbourn* made clear that the reach of the Speech or Debate Clause extends beyond a literal reading of its terms, several later Supreme Court decisions have carefully circumscribed the scope of the clause, holding that it applies only to *core legislative acts*, not incidental or peripheral activities of congressional offices. For example, in *Brewster*, the Supreme Court concluded that the Speech or Debate Clause "prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation of those acts." 408 U.S. at 512. The Court rejected a rule that anything "in any way related" to the legislative process was privileged, *id.* at 516, and it listed a variety of "political" activities that are not privileged, such as "'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to

constituents, news releases, and speeches delivered outside the Congress," *id.* at 512. *See also Hutchinson v. Proxmire*, 443 U.S. at 111, 131 (1979).

In *Gravel v. United States*, 408 U.S. 606 (1972), decided the same day as *Brewster*, the Supreme Court considered whether the clause protected the private publication of classified government documents. Senator Mike Gravel had placed the classified documents into the public record of a subcommittee meeting, but the Court concluded that a subsequent arrangement for private publication of the documents was not a protected legislative act. *Id.* at 625-26. The Court described the clause as covering only matters "integral [to] the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625. The Court then added that the protection "extend[s] . . . beyond purse speech or debate . . . , *but only when necessary to prevent indirect impairment of such deliberations*." *Id.* (emphasis added, internal quotation marks and citation omitted). In other words, the Court's relatively broad formulation of the Clause's scope was cabined by the requirement that the Clause should only apply to the extent necessary to protect actual speech or debate.

Unlike the Supreme Court, we have interpreted the Speech or Debate Clause in the employment litigation context. In *Walker*, 733 F.2d at 934, we held that the Clause permitted a general manager of the House restaurant to sue for sex discrimination. In that case, we posited a distinction between "staff . . . who help prepare for hearings or assist in the composition of legislative measures" and those who provide "[a]uxiliary services attending to human needs," and we held

that the latter group are not "'legislative' in character." *Id.* at 931. Judge MacKinnon concurred in part and dissented in part, arguing that the Speech or Debate Clause immunizes members of Congress from liability with respect to all employment decisions so long as those decisions *are treated as legislative* by Congress itself. *Id.* at 938 (MacKinnon, J., concurring and dissenting). Judge MacKinnon expressly rejected the court's measurement of Congress's actions against "some Platonic ideal of the 'legislative' process," arguing that Congress itself defines what is a legitimate subject of legislative decisionmaking. *Id.* In this regard, Judge MacKinnon noted that the restaurant manager had been terminated on the authority of a vote taken by a congressional subcommittee. *Id.* at 941-43.

Two years later, in *Browning*, 789 F.2d at 923, we held that the Speech or Debate Clause precluded any "judicial scrutiny" into the discharge of a House reporter whose job was to transcribe committee proceedings, *id.* at 924, and therefore it immunized Congress, its members, and their aides from liability, *id.* at 931. The court distinguished *Walker* on the ground that *Walker* involved an employee whose duties were not "directly related to the due functioning of the legislative process." *Id.* at 929 (emphasis omitted). The court articulated the following rule: "Where the duties of the employee implicate Speech or Debate Clause concerns, so will personnel actions respecting that employee." *Id.* at 928. Put another way, "[p]ersonal decisions are an integral part of the legislative process to the same extent that the affected employee's duties are an integral part of the legislative process." *Id.* at 928-29.

The line we drew in *Walker* and *Browning*, focusing on the complaining employee's *duties*, has some superficial appeal; its glaring flaw, however, is that it lacks any basis in the Speech or Debate Clause. Moreover, by defining very broadly the type of

duties that might constitute "an integral part of the legislative process"—even including within that definition a House reporter who lacked discretionary authority—we gave the immunity an unduly expansive scope. A rule of decision that more closely reflects the language and purpose of the Speech or Debate Clause would need to focus on the subject matter of the employee's lawsuit and the evidence the parties would need to present to the court, because the complaining employee's duties are an imperfect metric for probing whether the lawsuit will in fact force the court to inquire into protected matters. For example, even if a complaining employee's duties are central to the legislative process, as in the case of an employee who drafts legislation and floor speeches, the employee's lawsuit may turn factually on a series of overt requests for sexual favors and crude remarks, and therefore it may have nothing to do with the member's legislative activities. In short, by focusing on the duties of the complaining employee, *Walker* and *Browning* established a much broader immunity than necessary to protect legislative independence, and nothing in the Speech or Debate Clause or the Supreme Court's precedents compelled this broad immunity. Therefore, like Judge Randolph, Op. of Judge Randolph 18, I also would repudiate the reasoning used in *Walker* and *Browning* and proceed to the issue before us without the constraint of the framework imposed by those precedents.

III

In enacting the Congressional Accountability Act, Congress in effect sidestepped *Browning*'s broad formulation of immunity by designating the "employing office," rather than the member, as the defendant. 2 U.S.C. §§ 1301(9), 1408(b). Nevertheless, appellants in the two cases before us argue that the "employing office" can invoke the Speech or Debate Clause

on behalf of the member and thereby gain the benefit of the privilege. I reject this view.

First, it seems highly implausible, in light of Congress's unambiguous intention to open itself to liability under federal employment laws, that Congress designated a defendant that could invoke the member's Speech or Debate Clause rights. Why would Congress go to the trouble of designating the employing office as the defendant merely to create a bureaucratic redundancy able to assert the same privilege as the member?

Second, the Supreme Court has determined that a member's aide is permitted to invoke the Clause on the member's behalf because the aide acts *as an alter ego of the member*, working under the member's authority and subject to his direction. *Gravel*, 408 U.S. at 616-18. The same cannot be said of the employing office. This second point requires us to analyze exactly what the "employing office" is. Unfortunately, the law is not clear in this regard as it could be, but it is at least clear enough to say what the employing office is not; it is not an alter ego of the member.

The Act defines the "employing office" as

> (A) the personal office of a Member of the House of Representatives or of a Senator; (B) a committee of the House of Representatives or the Senate or a joint committee; (C) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or (D) [various specifically named offices within the legislative branch].

2 U.S.C. § 1301(9). For purposes of the cases before us, an "employing office" is the personal office of a member.

The personal office of a member, however, is not an independent legal entity, nor does it have any independent interests. It is not a person, nor a sovereign government, nor a branch of government, nor an agency created by statute, nor a chartered corporation, nor a trust, nor a partnership.[1] It is an organizational division within Congress, established for Congress's administrative convenience, analogous to a department within a large corporation. Therefore, an employee in the personal office of a member is in truth an employee of *Congress*, as to whom the member (acting on behalf of Congress) has supervisory control.

Title 2 of the United States Code is entitled "The Congress," and it deals generally with the administrative

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[1] The same, of course, might be said of a congressional committee, which would also qualify as an "employing office" under 2 U.S.C. § 1301(9). We are not here presented with a case involving a congressional committee as a defendant, but a committee arguably has a stronger claim to independent legal existence than a member's personal office in that a committee is formally established for certain express purposes and carries out actions in its own name, whereas a personal office exists only as a shell defendant to be sued under the Act. According to Judge Randolph, "the Supreme Court has held that legislative committees may invoke the [Speech or Debate] Clause." Op. of Judge Randolph 21 n.22 (citing *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951)). *Tenney* did not so hold. *Tenney* held that Congress did not intend 42 U.S.C. § 1983 to supplant common law principles of legislative independence by imposing possible civil liability on state legislative committees. *See* 341 U.S. at 376; *see also Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 732 (1980). Judge Randolph also relies on *Consumers Union of the United States, Inc. v. Periodical Correspondents' Ass'n.*, 515 F.2d 1341 (D.C. Cir. 1975). *Consumers Union* did not even involve a legislative committee as a defendant. Rather, it involved a private association, *id.* at 1345, that—like a legislative aide—acted on behalf of members of Congress, *id.* at 1350.

organization of Congress. Chapter 4 of Title 2, entitled "Officers and Employees of Senate and House of Representatives," governs employment-related administrative issues. Nothing in chapter 4 suggests that employees in member offices are anything other than congressional employees, or that member offices are anything other than administrative divisions within the two Houses of Congress. It is certainly true that Congress has chosen to adopt an administrative structure that gives great independence to its members. For example, each member of the Senate has a budget for employee compensation, 2 U.S.C. § 61-1(d)(1)(A); within the limits of that budget, "Senators may fix the number and the rates of compensation of employees in their respective offices" and "[a] Senator may establish such titles for positions in his office as he may desire to designate, by written notification to the disbursing office of the Senate," *id.* § 61-1(d)(2). Nevertheless, salary payments to these employees are administered centrally by the Secretary of the Senate. *Id.* § 60c-1. Similarly, members of the House of Representatives are authorized to employ as many as 18 permanent employees, *id.* § 92(a), but again, salary payments are administered centrally by the Chief Administrative Officer of the House of Representatives, *id.* §§ 60d-1, 95-1.

Thus, Congress has delegated to its individual members discretion in hiring, firing, and managing employees in their personal offices, but it did not make each of those offices into an independent government agency, and the employees remain employees of Congress as a whole. Congress could certainly choose to structure its administrative affairs in a different manner and may decide that stricter branch-wide personnel policies are warranted in order to limit violations of the Act. In any case, its current supervisory structure does not imply that the personal offices of its members are anything other than convenient administrative divisions.

For this reason, if we are to be legally precise, we cannot speak in terms of the "office" of a member taking a particular personnel action, because the "office" of the member is not a legal person. If a member hires or fires a legislative aide, the member makes a decision on behalf of the Congress, exercising power Congress has delegated to the member. *Cf.* 2 U.S.C. § 1301(9)(C) (designating as an "employing office" "any other office headed by *a person with* the final authority" to make personnel decisions (emphasis added)). The *office* of the member only gains some sort of quasi-legal existence when a dispute rises to the level of a suit under the Act. Then, the complaining employee has no choice but to name the member's office as the defendant because that is precisely what the Act instructs the employee to do. *Id.* § 1408(b). In sum, the "employing office" exists as a *prescribed label* for the defendant in a lawsuit under the Act, and it has no prior existence as an independent entity that took any specific action against the employee.

Therefore, though Congress has expressly designated the employing office as the *name* of the defendant, the question remains: Who is the real defendant behind the name? The answer to that question is not a simple one, but what is simple is that the member is not the real defendant, nor is the real defendant an alter ego of the member. First, Congress intended to subject the *legislative branch* to liability for violation of federal employment laws, not to subject its members personally to such liability. *See id.* § 1302. Second, *Congress's* attorneys defend the action. *See id.* § 1408(d); *see also* James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1, 10 n.46 (1999). Third, *Congress's* Office of Compliance has final settlement authority. *See* 2 U.S.C. § 1414. Fourth, funds appropriated to *Congress's* Office of

Compliance pay any settlement or judgment. *See id.* §§ 1381(a), 1415(a).

Moreover, nothing in the Act suggests that the member can make final litigation decisions on behalf of the employing office. It is true that the Executive Director of the Office of Compliance only has authority to approve or reject settlements "entered into by the parties," *id.* § 1414, implying that the employing office separately *negotiates* the settlement. However, it is not clear that the employing office would be under the direction of the member in this regard, especially because the member arguably has a personal interest in the litigation that is at odds with that of the employing office. Furthermore, this provision at most gives the member, acting as Congress's agent, an active role in the litigation; it clearly leaves the Office of Compliance as the final decisionmaker. It is also true that the Office of Compliance is to some extent an independent office within the legislative branch, subject to limited congressional oversight, *id.* § 1381, but if the Office of Compliance is not directly within Congress's control, it is certainly not within the *member's* control.

In short, the "employing office" is nothing like a member's aide, who can invoke the Speech or Debate Clause privilege on the member's behalf. Rather, by way of the Act, Congress sought to subject the legislative branch *as an institution* to federal employment laws. *Id.* § 1302(a). *Cf. Bastien v. Office of Senator Ben Nighthorse Campbell*, No. 01-cv-799, 2005 WL 3334359, at *4 (D. Colo. Dec. 5, 2005) ("[T]he term 'employing office' actually refers to Congress and Congress is the responsible entity under the CAA."), *quoted in* --- F.3d ---, 2006 WL 1756043, at *1 (10th Cir. June 28, 2006). Even if it is not quite apt to describe the "employing office" as an alter ego of Congress, it is far less appropriate to describe it as an

alter ego of the member.[2] Most accurately put, the "employing office" is an administrative division within Congress, designated to be named as the defendant in these actions. Nothing in that status suggests that an employing office can invoke a member's Speech or Debate Clause rights.

In addition, because the defendant in these suits is so differently situated than a member's aide, there is little reason to believe that allowing these suits to proceed will threaten legislative independence or unduly involve the judicial branch in the affairs of the legislative branch. Of course, the precise rationale of the Supreme Court in *Gravel*—that aides must be treated as members' alter egos because "the day-to-day work of such aides is so critical to the Members' performance," *Gravel*, 408 U.S. at 616-17—does not apply here because, under the Act, the employing office serves no role in a member's daily legislative work, functioning only as a defendant in employment suits. Nevertheless, *Gravel* also requires the court to extend Speech or Debate Clause protection if failing to do so "will inevitably . . .diminish[] and frustrate[]" the Clause's purposes of "prevent[ing] intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *id.* at 617, or if "judicial oversight . . . realistically threatens to control [a member's] conduct as a legislator," *id.* at 618. I do not believe, however, that the limited judicial oversight the Act permits will contravene these standards.

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[2] Judge Tatel contends that "[w]hether an aide acted as a Member's alter ego turns on the particular *act* the aide performed on the Member's behalf." Op. of Judge Tatel 2. Statutorily, a member's personal office only exists as a defendant to be sued under the Act. As the office is not an entity—actual or judicial—that can take actions, *a fortiori* it cannot act on behalf of the member; it is therefore precluded from qualifying as an alter ego of the member. Given that conclusion, I see no need to determine whether particular acts alleged in the complaint were "legislative," as those acts were not performed by the office itself.

To begin, the pressures the Act places on the member are slight: The member bears no financial risk—either from a judgment or attorneys' fees. The member, through invocation of the evidentiary privilege, which I discuss below, can avoid distractions by refusing to testify or provide evidence regarding legislative acts. The member may face some embarrassment by having his or her personnel decisions placed under the microscope, but little more than he would due to any other publicity-generating event. The conduct at issue in these suits must be considered to be at or beyond the outer edge of what is "integral [to] the deliberative and communicative processes by which Members participate in committee and House [or Senate] proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625; *cf. Forrester v. White*, 484 U.S. 219, 229 (1988). Taken together, these considerations suggest that suits under the Act against the employing office do not "realistically threaten[] to control [a member's] conduct as a legislator." *Gravel*, 408 U.S. at 618.

Thus, I see no reason to conclude that the employing office in an action brought pursuant to the Act is entitled to invoke the Speech or Debate Clause, either on its own behalf or on behalf of a member. Clarifying this point is critical because it establishes that appellants in these cases cannot assert the Clause as a jurisdictional bar, regardless of whether the actions are predicated on legislative acts, and it also impacts how the Clause applies as an evidentiary rule.

Under the Supreme Court's cases, the Speech or Debate Clause often operates as an immunity from suit—or, more precisely, as a jurisdictional bar depriving courts of the power to hear the suit. In *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967), for example, the Court stated that, when the Speech or

Debate Clause applies, members of Congress "should be protected not only from the consequences of litigation's results but *also from the burden of defending themselves*." *Id.* at 85 (emphasis added). Similarly, in *Gravel*, the Court said that members of Congress are "shielded by the Speech or Debate Clause both from liability for their illegal legislative act and from having to defend themselves with respect to it." 408 U.S. at 620. And, in *Doe v. McMillan*, 412 U.S. 306, 318 (1973), the Court stated that certain acts "may not serve as a predicate for a suit" against members and aides, requiring dismissal of the complaint. Appellants here hope to gain the benefit of this jurisdictional bar, but allowing the suits to proceed will not force the members of Congress to bear the burden of defending the suits, nor will it subject the members to civil or criminal liability that might undermine their independence as legislators. Because appellants are not members of Congress, or alter egos of members, and therefore have no Speech or Debate Clause protection, the jurisdictional bar is not applicable.[3]

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[3] Because I conclude that members' offices cannot assert the protections of the Speech or Debate Clause, I do not reach the subsequent questions of whether the acts alleged in the complaints in these cases are "legislative" and the jurisdictional significance of that determination. *Cf.* Op. of Judge Randolph 20-21. However, if the defendants here could assert the Speech or Debate Clause, I believe the jurisdictional application of the clause might be broader than Judge Randolph suggests. For the purposes of the Speech or Debate Clause to be fulfilled, it arguably ought to bar as a jurisdictional matter not only lawsuits in which the complaints are predicated on legislative acts, but also suits that will inevitably necessitate an inquiry into such acts and motivations, even where such inquiry would arise due to an affirmative defense. *Cf. Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979) ("*Defenses* based upon the Clause should thus ordinarily be given priority, since federal legislators should be *exempted from litigation* if their conduct is in fact protected by the Clause." (emphases added)). If, for example, a member is a named defendant in a state law tort action alleging wrongful termination, limiting the member to an evidentiary application of the Clause seems too restrictive.

That conclusion does not, however, suggest the Clause can play no part in these actions. The Supreme Court has also articulated an *evidentiary* application of the Speech or Debate Clause for those cases not requiring dismissal of the complaint on jurisdictional grounds. In *Brewster*, 408 U.S. 501, the Court stated that "a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." *Id.* at 512. Applying this rule, the Court permitted a bribery prosecution of a member of the Senate to go forward, because the prosecution focused only on whether the member received compensation in exchange for a *promise* to vote a certain way, and not on how the member *actually* voted or why. *Id.* at 525-27. Hence, the Court concluded that no "inquiry into a legislative act or the motivation for a legislative act [is] necessary to a prosecution under this statute or this indictment." *Id.*

In *United States v. Helstoski*, 442 U.S. 477 (1979), the court made clear that the holding in *Brewster*—permitting criminal prosecutions that do not rely on proof of legislative acts or the motives for such acts—should be applied as an evidentiary rule governing proceedings at trial. *Helstoski* concerned a criminal prosecution of a former member of the House in relation to "allegations that aliens had paid money for the introduction of private bills which would suspend the application of the immigration laws so as to allow them to remain in this country." *Id.* at 479. The Supreme Court instructed the trial court to apply the Speech or Debate Clause as a rule of evidence: "[*Johnson* and *Brewster*] leave no doubt that evidence of a legislative act of a Member may not be introduced by the Government in a prosecution . . . ." *Id.* at 487. "Nothing [however] in our opinion . . . prohibits excising references to legislative acts, so that the remainder of the evidence would be admissible." *Id.* at 488 n.7. "As to what

restrictions the Clause places on the admission of evidence, . . . [the Court's] concern is whether there is mention of a legislative act." *Id.* at 490.

In *Gravel*, 408 U.S. 606, as already discussed, the Court extended Speech or Debate Clause protections to congressional aides. The Court distinguished *Kilbourn*, noting that in *Kilbourn* (and other cases permitting civil actions against aides), "relief could be afforded [against the aide] without proof of a legislative act or the motives or purposes underlying such an act." *Id.* at 620-21. By contrast, if the lawsuit requires proof of a legislative act or the motive for such an act, then the aide can assert the Speech or Debate Clause protections. *Id.* at 621-22. Notably, the Court clarified in a footnote that its holding did not apply to cases in which the defendant was neither a member of Congress nor an alter ego of a member: "We do not intend to imply, however, that in no grand jury investigations or criminal trials *of third parties* may third-party witnesses be interrogated about legislative acts of Members of Congress." *Id.* at 629 n.18 (emphasis added).

The cases now before us present the situation contemplated in the footnote in *Gravel*, because the defendants in these cases are neither members of Congress nor aides of members, and as the *Gravel* footnote suggests, this fact is significant as regards the evidentiary application of the Clause.[4] In a civil or criminal

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[4] Under Judge Randolph's approach, a "case can go forward" if it "does not inquire into legislative motives or question conduct part of or integral to the legislative process," but should be dismissed if it would require any inquiry into legislative acts. Op. of Judge Randolph 27. While Judge Tatel purports to join Judge Randolph's opinion in full, he admits that, according to the *Gravel* footnote, at least some evidence of legislative acts may be admitted against third-party defendants. See Op. of Judge Tatel 5. Such a concession effectively undermines Judge Randolph's approach; the possibility of admitting such evidence means that many suits may

suit against a member or an aide, any inquiry into legislative acts amounts to an impermissible "question[ing]," in violation of the Speech or Debate Clause. *See Helstoski*, 442 U.S. at 489; *Brewster*, 408 U.S. at 525. This rule makes sense because, in order to defend the suit fully, the member or aide would have to respond to any evidence of legislative acts introduced against him, no matter the source of the evidence, and the member's silence might work to his disadvantage. In these cases, on the other hand, the defendants are not members or aides but employing offices, entities that cannot themselves assert the protections of the Speech or Debate Clause. The purposes behind the Speech or Debate Clause are not implicated by an inquiry into legislative acts in such cases, as the suits threaten neither the independence of the legislature as a whole nor of the individual members. Because the members are not defendants, the suits do not burden them with defense costs nor place them at any risk of personal liability, and as long as members and their aides are not themselves "questioned," an inquiry into legislative acts does not implicate the Speech or Debate Clause. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). Thus, where the member is not a party, the Clause functions only as a testimonial and documentary privilege, to be asserted by members and qualified aides if they are called upon to produce evidence. We need not explore the precise contours of this privilege today; the district court may address these problems as they arise. Of course, when the privilege makes relevant evidence unavailable, the parties will have to present their cases as best they can without the evidence, as would occur in other instances when non-parties possess privileged information.

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proceed even if they would entail some inquiry into legislative acts.

IV

The Supreme Court has liberally construed the Speech or Debate Clause, but it still remains tethered to its underlying purpose. *Brewster*, 408 U.S. at 516. Its purpose is not to immunize Congress from all liability; rather, its purpose is to ensure free and unrestrained discussion, debate, and decision relating to legislative matters. We can always hypothesize long cause-and-effect chains by which remote events were not the concern of the Framers of our Constitution when they included in that document a clause protecting legislative speech and debate. Rather, they were concerned with much more immediate threats to legislative independence. They were concerned that members of Congress would be arrested or held liable specifically on account of arguments they had voiced in the course of heated debates over pending legislative issues. *Johnson*, 383 U.S. at 182. They were concerned about the political rivalries that naturally arise among the several branches of government, rivalries that might cause a hostile executive or judiciary to harass a member of Congress who had been outspoken about some abuse of power. *Id.* at 179-81. In addressing these concerns, they did not intend "to make Members of Congress super-citizens," *Brewster*, 408 U.S. at 516, who could block all judicial inquiry into their personnel practices and workplace conduct.

Appellants in these actions are not members of Congress entitled to invoke the Speech or Debate Clause, nor are they alter egos of members. Therefore, the Speech or Debate Clause does not provide a basis for dismissing these actions; rather, it operates as an evidentiary protection for members of Congress and their aides who might be asked to provide evidence in these actions. For these reasons, I agree that we should affirm the district court's orders denying defendants' motions to dismiss.

APPENDIX B

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-01149-RJL

HANSON v. OFFICE OF SENATOR MARK DAYTON
Assigned to: Judge Richard J. Leon
Cause: 42:1983 Civil Rights (Employment Discrimination)

Date Filed: 05/29/2003
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Job
Jurisdiction: U.S. Government Defendant

Plaintiff

BRAD HANSON
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ATTORNEY TO BE NOTICED

V.

Defendant

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03/12/2004	20	NOTICE of Change of Address by Jean Marie Manning. (Manning, Jean) (Entered: 03/12/2004)
09/07/2004		MINUTE ORDER denying 12 Motion to Dismiss by OFFICE OF SENATOR MARK DAYTON. Signed by Judge Richard J. Leon on 09/07/2004. (lcrjll,) (Entered: 09/07/2004)

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 04-5335 **September Term, 2006**

BRAD HANSON,
APPELLEE

v.

OFFICE OF SENATOR MARK DAYTON,
APPELLANT

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

Filed August 18, 2006

CLERK

Appeal from the United States District Court
for the District of Columbia
(No. 03cv01149)

Before: GINSBURG, *Chief Judge*, and SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND,* BROWN, GRIFFITH, AND KAVANAUGH,* *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

MANDATE
Pursuant to the provisions of Fed. R. App. Pro. 41(a)

Issued: 10/19/06
By: s/Michael C. McGrail

Attached: ___Amending Order
___Opinion
___Order on Costs

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Michael C. McGrail

Michael C. McGrail
Deputy Clerk

Date: August 18, 2006

* Circuit Judges Garland and Kavanaugh did not participate in this matter.

Opinion for the court in part filed by Circuit Judge Randolph, in which Chief Judge Ginsburg and Circuit Judges Henderson and Tatel join.

Opinion concurring in part and in the judgment filed by Circuit Judge Rogers.

Concurring opinion filed by Circuit Judge Tatel.

Opinion concurring in the judgment filed by Circuit Judge Brown, in which Circuit Judges Sentelle and Griffith join.

APPENDIX D

Article I, Section 6, Clause 1 of the United States Constitution provides as follows:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

APPENDIX E

2. U.S.C. § 1413

§ 1413. Privileges and Immunities

The authorization to bring judicial proceedings under sections 1405(f)(3), 1407, and 1408 of this title shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, of the Constitution, or a waiver of any power of either the Senate or the House of Representatives under the Constitution, including under article I, section 5, clause 3, or under the rules of either House relating to records and information within its jurisdiction.

2 U.S.C. § 1408(a) and (b)

§ 1408. Civil Action

(a) JURISDICTION.—The district courts of the United States shall have jurisdiction over any civil action commenced under section 1404 of this title and this section by a covered employee who has completed counseling under section 1402 of this title and mediation under section 1403 of this title. A civil action may be commenced by a covered employee only to seek redress for a violation for which the employee has completed counseling and mediation.

(b) PARTIES.—The defendant shall be the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred.

2 U.S.C. § 1412

§ 1412. Expedited Review of Certain Appeals

(a) IN GENERAL.—An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this chapter.

(b) JURISDICTION.—The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal referred to in subsection (a) of this section, advance the appeal on the docket, and expedite the appeal to the greatest extent possible.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRAD HANSON	)	
Plaintiff,	)	
v.	)	**Case No. 1:03CV01149 (RJL)**
OFFICE OF SENATOR MARK DAYTON	)	
Defendant.	)	

DECLARATION OF MARC KIMBALL

I, Marc Kimball, have personal knowledge of the following facts, and I could and would testify to them if called to do so:

1. Senator Dayton was elected to serve as a U.S. Senator beginning in January 2001. I have been employed by the Office of Senator Mark Dayton ("the Office") in its Fort Snelling, Minnesota, office since its opening in January 2001.

2. I am the Office's Deputy Chief of Staff, and I have held that position since August 1, 2001. My responsibilities as Deputy Chief of Staff include overseeing all employees who work in Senator Dayton's offices located in Minnesota. From June 15, 2001, to August 1, 2001, I was the Office's Deputy State Director/Communications Director, and from January 3,

2001, to June 15, 2001, I was the Office's Communications Director.

3. Brad Hanson began working for the Office when it opened in January 2001. Throughout his employment with the Office, Mr. Hanson was assigned to the Fort Snelling office. From January 3, 2001, to March 1, 2001, Mr. Hanson's title was Office Manager/Case Worker; from March 1, 2001, to August 1, 2001, his title was Constituent Advocate; and from August 1, 2001, until the termination of his employment on July 3, 2002, he was the Director of Health Care Advocacy/State Office Manager. When Mr. Hanson began his employment with the Office, he was responsible for (i) setting up and opening Senator Dayton's Fort Snelling office; (ii) assisting in setting up the Senator's Thief River Falls and Biwabik state offices; (iii) helping constituents with problems mainly in the healthcare and law enforcement areas; (iv) attending constituent meetings and community events as the Senator's representative to learn of constituent concerns in the healthcare and law enforcement areas; and (v) briefing the Senator on developments, problems, and constituent concerns and opinions regarding healthcare and law enforcement. After the initial set-up of the state offices, although Mr. Hanson continued to perform some office manager duties, he spent most of his time working in the healthcare and law enforcement areas.

4. Improvement in healthcare is a paramount concern of Senator Dayton and has been a goal of his Office since its opening in 2001.

5. In early August 2001, the Office began a Health Care Help Line ("HCHL"), which is a "1-800" dedicated phone line that constituents could call to obtain assistance regarding denied medical care or refused third-party payments for such

care and to inform the Office about healthcare issues of importance to them. From the inception of the HCHL, Mr. Hanson was the Director of Health Care Advocacy and, as such, director of the HCHL.

6. I am aware that Senator Dayton's primary responsibility is to represent the people of Minnesota before the United States Senate and that he cannot effectively do that unless he is informed of Minnesotans' concerns and priorities. I also know that, due to the wide breadth of demands on his time, Senator Dayton cannot meet with every Minnesotan. Therefore, some of his employees, including Mr. Hanson when he was employed by the Office, must act as the Senator's representative by communicating with his constituents at meetings and on the telephone. During the course of Mr. Hanson's employment, his primary duties included meeting with, and fielding telephone calls from, constituents, community groups, and community leaders to learn, among other things, their (i) opinions about whether Senator Dayton should support or oppose certain legislation and (ii) suggestions regarding legislation Senator Dayton should introduce. Mr. Hanson acted as the Senator's eyes and ears during these meetings and telephone calls, and he gathered information that would inform the Senator in his legislative duties. The information Mr. Hanson gathered from constituents, which was passed on to Senator Dayton, helped shape the Senator's legislative agenda and assisted him in representing Minnesotans. Based on concerns constituents voiced to Mr. Hanson, he presented ideas to Senator Dayton that directly caused Senator Dayton (i) to initiate and to sponsor legislation in the United States Senate and (ii) to initiate a hearing before a Senate Committee of which Senator Dayton is a member.

7. Annexed as Exhibit 1 is a self evaluation Mr. Hanson completed in May 2001 setting forth his job responsibilities and

accomplishments during the first 4 to 5 months he was employed in the Office. Mr. Hanson's self evaluation states that one of his responsibilities was to obtain information, opinions, and concerns from constituents for the Senator. Further, Mr. Hanson listed the following among his accomplishments:

- Attended functions on Senator Mark Dayton's behalf;
- Attended meetings with community groups, representing Senator Dayton;
- Identified opportunities for the following legislative initiatives:
  a) Raising age of mandatory retirement for federal law enforcement officials;
  b) Obtaining Medicare payments for ambulances;
  c) Highlighting the importance of the COPS program to Minnesota agencies.

8. Annexed as Exhibit 2 is a self evaluation Mr. Hanson completed in the winter of 2001 setting forth his job responsibilities and accomplishments. Among the job responsibilities Mr. Hanson listed are:

- Define healthcare issues for legislative agenda;
- Write legislative briefs relative to healthcare;
- Brief Senator;

- Acquire information, opinions and concerns for Senator Dayton;
- Work with Washington, D.C. policy staff;
- Represent the Senator to organizations and individuals.

Among his accomplishments, Mr. Hanson listed:

- Attended Agency meetings representing Senator Dayton;
- Attended meetings with community groups, representing Senator Dayton;
- Held meetings around state to solicit information about Medicare reimbursement problems;
- Provided briefings for Senator Dayton as needed;
- Identified opportunities for legislative initiatives with respect to the following issues:
    a) Medicare payments for ambulances;
    b) The lack of government oversight to compel contract compliance for self-insured plans;
    c) The lack of coverage for prescription drugs for disabled Medicare recipients;
    d) Raising age of mandatory retirement for federal law enforcement officials;

e) Highlighting importance of the COPS program to Minnesota agencies.

In addition, the HCHL team, under the direction of Mr. Hanson, prepared drafts of an HCHL manual stating: "Legislation is a goal of the HCHL," "Identify and discuss patterns that suggest that legislation is needed" and "Report regularly to the Senator, Chief of Staff, and State Director."

9. After hearing from Minnesotans, Mr. Hanson told me in May or June 2001 that he had identified a pattern of problems concerning declining Medicare reimbursements to ambulance service providers and increasing payment delays. He suggested that he and I meet with Gary Wingrove of Gold Cross Ambulance Service and O.J. Doyle, an EMS consultant, to explore the problems and potential solutions.

10. Mr. Hanson and I met with Gary Wingrove and O.J. Doyle in the Office's Fort Snelling location. As a result of that meeting, Mr. Hanson and I decided to hold a series of meetings with constituents throughout Minnesota. The purpose of these meetings was to gather information from the ambulance service providers and others throughout the state concerning their reimbursement problems, the reasons for them, the economic and service repercussions from them, and their recommended solutions.

11. During the period June 14 through July 12, 2001, the Office held seven group constituent meetings in all parts of the state to help the Office grasp the extent and scope of the problems jeopardizing ambulance service in Minnesota. The meetings were held in Hibbing, Duluth, St. Cloud, Moorhead, Bemidji, Marshall, and Harmony, Minnesota. Mr. Hanson was one of the principal spokespersons and listeners for Senator

Dayton at all seven meetings. I participated in all of the meetings except the one in Marshall.

12. Taking into account the information we gathered from these meetings, Mr. Hanson and I discussed possible solutions to the problems we had learned from constituents. We also shared the information we had gathered and discussed potential solutions with various staff in our D.C. office, such as the Chief of Staff, the Legislative Director, and Legislative Assistants involved in healthcare matters. Mr. Hanson and I, along with the D.C. staff with whom we shared the information we had gathered, also educated Senator Dayton on the ambulance reimbursement problems the people of Minnesota were experiencing and suggested potential solutions to him. Annexed as Exhibit 3 is a memo to Senator Dayton that resulted from the information Mr. Hanson and I gathered at the various constituent meetings and the brainstorming sessions we subsequently had with other Office staff. The memo explains the various problems to the Senator and proposes several legislative options, along with a recommendation that the Government Subcommittee on Investigations, of which Senator Dayton is a member, study the issue.

13. As a direct result of the meetings Mr. Hanson held with constituents, Senator Dayton's staff, including Mr. Hanson, drafted, and Senator Dayton introduced, a bill, the Medicare Ambulance Payment Reform Act of 2001 ("MAPRA"). The legislation sought to remedy some of the ambulance repayment problems. Annexed as Exhibit 4 is an August 2001 article by O.J. Doyle, in which he states, "Introduction of the [MAPRA] bill was the culmination of hearings held around the state to determine the health of ambulance providers" and "Dayton and top staffers, Brad Hanson and Marc Kimball, have done a great job with this legislation and deserve our appreciation." Annexed as Exhibit

5 is an announcement of Senator Dayton's introduction of MAPRA. The announcement acknowledges that the legislation grew out of the meetings Mr. Hanson, I, and other members of our staff had with Minnesota ambulance providers that summer.

14. On November 15, 2001, the Senate Committee on Governmental Affairs held a public hearing entitled "Oversight of the Centers for Medicare and Medicaid Services: Medicare Payment Policies for Ambulance Services." This hearing, which Senator Dayton initiated and chaired, was one of the potential solutions Mr. Hanson, other members of the Dayton staff, and I had proposed to the Senator as a result of our constituent meetings and brainstorming sessions. Mr. Hanson was one of a few staff members who planned the hearing, decided on its issues, selected hearing witnesses, and prepared questions that Senator Dayton asked at the hearing. After the hearing, Mr. Hanson developed follow up questions that were submitted for the official hearing record.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 10 day of September 2003.

/s/
Marc Kimball

Brad Hanson ***May 11, 2001***

Job Evaluation

This job evaluation is to be completed by each staff member of Senator Dayton's Fort Snelling Office. Please return to Kate or Kim by May 11, 2001. This form will also be e-mailed to you for completion on the computer.

1. What are your job's responsibilities? What percent of your time is spent on each one?

    - State Office Manager (100% in January, 35% currently)
        - Oversee the office infrastructure.
        - Move furniture.
        - Provide for availability of standard office supplies.
        - Support PCs, Printers, copier, satellite TV, and cable connections.
        - Administrative NT server.
        - Facilitate reception desk coverage.
        - Educate as needed for PC applications.
        - Provide any other support to staff.
        - Handle callers, or people who drop in, that may be unstable, threatening, or generally difficult.
        - Maintain a safe environment.
        - Move furniture.

    - Constituent Advocate (65%, (64% casework, 1% outreach))
        - Receive and respond to correspondence.
        - Pursue casework on constituent's behalf.
        - Outreach - Represent Mark to organizations and individuals.
            - Criminal Justice agencies
                - Law enforcement agencies on all levels.

- Corrections workers.
- Emergency Medical Services (EMS)
  - Police, Paramedics, and Fire Rescue.
- Fire fighters.
- Health care providers.
- Health care insurance companies and HMOs.
- Guns (Although the NRA has not called me yet.)
- Social Security benefits when it is part of the Help Line.

- Acquire information, opinions, and concerns for Mark.
- Work with Washington policy staff.

2. What have you accomplished in the last three months?

Office Manager

- Set up the main office and arranged for furniture for out-state office.
- Established working relationships with facility management staff, Federal Protective Services, and with federal agencies that effect our existence.
- Acquired equipment as needed, including, but not limited to copier, fax machine, furniture, filing cabinets, printer paper, and pencil holders.
- Assisted State Director with new employees, handling forms, Ids, answering questions, etc.
- Provided training for office assistants.
- Developed and explained to staff office security procedures.
- Moved furniture.

Constituent Advocate

- Transitioned the Health Care Help Line (HCHL).
- Continued HCHL cases from campaign and started new ones.
- Advocated for Social Security cases.
- Advocated for prison health care cases.
- Attended functions on Mark's behalf.
- Attended meetings with community groups, representing Mark.
- Established connections with several law enforcement organizations.
- Identified opportunities for legislative initiatives.
    - Raise age of mandatory retirement for federal law enforcement.
    - Medicare payments for ambulances.
    - COPS program importance to Minnesota agencies.
- Handled numerous calls, providing support, answering questions, and researching for information, on a variety of topics of interest to constituents.

3. What do you intend to accomplish during the next three months?

- Move the Health Care Help Line to a high level of functionality.
- Establish a regular, probably quarterly, meetings with police chiefs.
- Expand my outreach efforts if casework allows.

4 How can the organization improve its performance and results over the next three months?

- Develop systems that efficiently handle the volume of correspondence and casework we receive.

5. Are you in agreement with the organization's Mission Statement, values and organizational culture? Yes.

   Is there anything you would change about, or add to, them? Not at this time.

6. What can the office (Mark, supervisor, co-workers) do to help you do your job better? What resources would help you do your job better?

   - I would benefit most from clerical help and intake phone assistance.
   - When Mark meets with organizations I deal with, any influence he can exert to persuade them to cooperate with case resolution would be extremely helpful to those we serve.

Office of Senator Mark Dayton
Winter, 2001

Job Evaluation

1. What are your job responsibilities? What percent of your time is spent on each one?

   Director of Health Care Help Line (70%)
   - Spokesperson
   - Oversight of casework
   - Coordination of health care related outreach
   - Train, advise, and monitor caseworkers
   - Selection of interns
   - Train interns and manage daily responsibilities
   - Field emergency and more difficult cases
   - Facilitate weekly meetings with Health Care Help Line team
   - Collect data and maintain database
   - Interpret data
   - Define health care issues for legislative agenda
   - Write legislative briefs relative to health care
   - Brief Senator
   - Establish and maintain connections with Federal, State, and local government health care related agencies, and with private agencies and insurance companies

   State Office Manager (20%)
   - Oversee the office infrastructure.
   - Support PCs, Printers, copier, satellite TV, and cable connections.
   - Liaison with Federal Building facilities management and Federal Protective Services
   - Administrative NT and Lotus servers.
   - Educate staff as needed on PC applications.

- Provide any other needed support to staff.
- Handle callers, or people who drop in, that may be unstable, threatening or generally difficult.
- Work with Washington Capitol Police when necessary.
- Maintain a safe environment.

Outreach - Represent Mark to organizations and individuals (5%)

- Health care providers.
- Health care insurance companies and HMOs.
- Emergency Medical Services (EMS)
- Police, Paramedics, and Fire Rescue.
- Criminal Justice agencies
- Law enforcement agencies on all levels.
- Corrections workers.
- Fire fighters.
- Social Security benefits when it is part of the Help Line.
- Guns (Although the NRA has not called me yet.)

Legislation (5%)

- Acquire information, opinions, and concerns for Mark.
- Work with Washington policy staff.

- What have you accomplished in the last six months?
  - Trained several caseworkers.
  - Advocated for Social Security cases.
  - Advocated for prison health care cases.
  - Attended Agency meetings representing Mark.
  - Attended meetings with community groups, representing Mark.
  - With Marc and Jim held meetings around state to solicit information about the Medicare reimbursement problems.
  - Established connections with several law enforcement organizations.

- Identified opportunities for legislative initiatives.
  - Medicare payments for ambulances.
  - Lack of government oversight to compel compliance with contracts for companies self insured plans
  - Lack of coverage for prescription drugs for disabled medicare recipients
  - Raise age of mandatory retirement for federal law enforcement.
  - COPS program importance to Minnesota agencies.
- Provided briefings for Mark as needed.
- Handled numerous calls, providing support, answering questions, and researching for information, on a variety of topics of interest to constituents.

2. What do you intend to accomplish during the next six months?
   - Continue the efforts currently in process.
   - Expand were possibilities present themselves. For instance: Work with some of the large ambulance providers to get Medicare reimbursement. Hennepin County was owed over two million dollars by mid year.
   - Expand my law enforcement connections.
   - Work with law enforcement departments and the military to get the program working that is supposed to be providing equipment to law enforcement.

3. How can the organization improve its performance and results over the next six months?

4. Are you in agreement with the organization's Mission Statement, values and organizational culture? Is there anything you would change about, or add to, them?

- I am in agreement and don't have any changes to suggest.

What can the office (Mark, supervisor, co-workers) do to help you do your job better? What resources would help you do your job better?

MEMORANDUM

July 2, 2001
TO: Mark
FROM: Kerri, Kimball, Katherine, and Fatima
RE: Ambulance Problems in Minnesota

Brad and Marc Kimball have held meetings with ambulance providers in Hibbing, Duluth, Moorhead, St. Cloud, and Bemidji, with attendance ranging from 15-30 attendees per meeting.

Below are the main issues they heard about:
1) The biggest concern amongst attendees was that Medicare is denying ambulance care claims. These are not isolated cases, and there does not appear to be a "standard rule" for denying these claims. Medicare is not processing all claims identically. Currently, Medicare's Health Care Financing Agency (HFCA) hires "for profit" companies–usually insurers–to process ambulance bills. These processors are now denying claims at a fast-increasing and alarming rate and doing so in a way that often pits ambulance providers against their patients.

Medicare's explanation to patients who are denied payment often faults the ambulance providers for errors in submitting the claim. This creates a situation where the patient is not only stuck with the bill, but is also under the impression that the ambulance provider–who may have actually saved the patient's life–is at fault.

What's worse is some beneficiaries have been burned by the system once or more are now hesitating to call an ambulance–even if they need it–so they aren't stuck with the costly, unpayable bill.

Emergency Medical Technicians (EMTs) complained that they must ask patients to fill out a form that states that they will be responsible for payment if Medicare denies payment. EMS providers feel that this is not an appropriated task for the EMT provider during an emergency.

Emergency Medical Service (EMS) providers **feel strongly** that the person who places the 911-call (a prudent layperson) should be the sufficient in determining if a patients needs ambulance service.

EXAMPLES:

- A patient drove to the store, went unconscious and hit a light pole. Someone called 911, the patient was discharged with a mini-stroke and Medicare denied the claim.

- A family member called 911 for a beneficiary and the claim was denied. Medicare stated that the family member could have brought the patient in his car.

- A patient needed to see his doctor. The doctor was at the local clinic instead of the hospital. The doctor requested the beneficiary be transported to the clinic. The claim was denied, the doctor wrote an appeal letter, the claim was denied a second time. Medicare doesn't pay for ambulance service to transport patients to clinics or nursing homes.

Legislative option: You are currently on a bill, *Sustaining Access to Vital Emergency Medical Services Act of 2001*, which calls for a "prudent lay-person" standard to be used on Medicare EMS calls. Passage of this bill would address one aspect of the problem.

You could offer legislation, modeled after current Minnesota law, that says Medicare must pay all ambulance related costs in an emergency if 911 is used. This is stronger than the legislation you are a cosponsor of.

Encourage the Government Subcommittee on Investigation to examine the problem and amend current rules.

2) According to Medicare, part of the problem with denials is in EMS coding. With the existing coding system for Medicare, the EMS providers have to use **doctor diagnosis codes**. EMS providers are not doctors and thus cannot diagnose a patient. EMS providers want to use **symptom** coding. Symptom codes will define the complaints.

An EMT or a paramedic is qualified to do only the following:

- Access the A-B-Cs
    - Airway
    - Breathing
    - Circulation
- Determine:
    - Chief complaint.
    - What precipitated complaint.
    - What are the current symptoms.
- Then the EMT or paramedic must stabilize and transport the patient.

- Treat the patient and maintain or improve their condition until they reach the hospital.

Option: Send a letter to HCFA Administrator, Thomas Scully, recommend that they adopt and mandate the use of already developed symptom coding system.

3) The final problem expressed by EMS providers is a proposed rule that implements a new Medicare fee schedule.

Fee Schedule

- The proposed fee schedule derived from the Balanced Budget Act of 1997, impacts Medicare ambulance reimbursement in two separate ways:
  - The development of a revenue-neutral ambulance fee schedule, using a negotiated rulemaking committee.
  - Ambulance providers would be under mandatory assignment. (The ambulance provider accepts whatever payment Medicare provides and cannot bill patient for any balance.)
- Last September, the Department of Health and Human Services proposed a rule that changes the fee schedule for Medicare ambulance services. The final rule has not been published yet.
- In Minnesota the average charge for ambulance service was $685. In 1999, the maximum reimbursement from Medicare was $578. The range was $112 to $578, with the average being $371. Under the new Medicare fee schedule, Minnesota ambulance services will see Medicare payments reduced by about half. **If the new fee schedule goes into effect, the MN Ambulance Association estimates that the state's ambulance providers will lose $37 million of the $140 Million they get from Medicare.**

- **EXAMPLE:** The city of Hibbing is currently at $740,000 in EMS revenue.
  - In the first year of the proposed rule the City will **lose $130,000**.
  - By the end of the fourth year of the proposed fee schedule the total effect will be a **$350,000 loss**.
  - Either taxpayer subsidizes the loss or services get cut.
- There would be 32 states/territories that would be adversely affected by this proposed fee schedule.

Legislative Option: Offer legislation requesting implementation of the final fee schedule rule be delayed until the GAO is able to further study the implications.

Legislative Option: Offer legislation requiring the Secretary of Health and Human Services use a fee schedule based on the Project HOPE Study.

Send a letter to Secretary Thompson outline your concerns with the proposed rule.

Minnesota State Legislature – Capitol UPDATE
By O.J. Doyle, EMS Consultant
August 2001
Volume 15, Issue 26

REDACTED

Senator Dayton – Bill Announcement

On August 3, Minnesota Senator Mark Dayton introduced S. 1350 - the Medicare Ambulance Payment Reform Act of 2001. Similar to previous legislation sponsored by former Senator Rod Grams, it seeks the prudent layperson standard for ambulance reimbursement: better means of defining "rural ambulance services" and improving reimbursements; and, an increase in Medicare reimbursement for ambulance.

The Senator changed his vacation plans to appear at a press conference on the steps of the State Capitol, in St. Paul, earlier this month to announce this important initiative. Introduction of the bill was the culmination of hearings held around the state to determine the health of ambulance providers. Over 25 ambulances and numerous personnel from around the state appeared with Senator Dayton. Three television and two radio stations were present and newspaper reporters put stories on the wire services.

Dayton and top staffers, Brad Hanson and Marc Kimball, have done a great job with this legislation and deserve our appreciation.

REDACTED

Date: 8/8/01 10:25 AM
Sender: Sara Howard
To: #Minnesota Offices; Dana Anderson; sbradach@cpinternet.com; Jim Gelbmann; Rebecca Gutierrez; Brad Hanson; Kate Jaycox; Barbara Johnson; Marc Kimball; Andrea Moerer; Shubha Muralidhara; Kristine Palmer; Kim Sobasky; Seng Vang; Gary Wertish; Laura Wolff; #Washington Office
Priority: Normal
Subject: Dayton announces ambulance legislation

For Immediate Release

Contact Marc Kimball 612-727-5220, Sara Howard 202-224-3244

August 8, 2001

Dayton Announces Legislation to Help Ensure Quality Ambulance Service in Minnesota, Across the Country
Says Medicare Policies and Procedures Threaten Ambulance Services, Patients Alike

FORT SNELLING, MN - Senator Mark Dayton, saying that reliable ambulance service is often a matter of life and death, today announced legislation to head off growing problems that are putting ambulance providers in Minnesota and across the country in financial jeopardy and affecting their ability to respond to patients who need care.

Dayton said his "*Medicare Ambulance Payment Reform Act*," introduced just before the August Congressional break, will help ambulance providers who are being threatened by inadequate Medicare payments and the inappropriate payment denials by Medicare claims processors. The continuing

difficulties jeopardize the level of care they can deliver, and ultimately may increase the time it takes them to respond to patients in an emergency, he said.

"When people in Minnesota and across the country have an emergency like a heart attack or stroke, they want to know that life-saving ambulance service will be available when they need it," Dayton said. "However, current Medicare policies and procedures jeopardize quality ambulance service and force many providers to struggle to stay in business - especially in rural communities. Putting patients' health and well being at risk is unacceptable. My legislation addresses problems that threaten ambulance service for patients in Minnesota and across the country."

This summer, Dayton's staff met with more than 100 ambulance providers, patients and other officials in communities across the state who are concerned that problems with the federal Medicare program are beginning to decrease the level of care they can deliver, and increase the time it takes them to respond to patient calls. Dayton's legislation grew out of those meetings with Minnesota ambulance providers.

Attached is an outline of Dayton's legislation.

APPENDIX G

[Filed October 31, 2006]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRAD HANSON	
Appellee,	
v.	**No. 04-5335**
OFFICE OF SENATOR MARK DAYTON	
Appellant.	

APPELLANT'S NOTICE OF APPEAL
TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Office of Senator Mark Dayton (the "Dayton Office"), Appellant in the above-named case, hereby appeals to the Supreme Court of the United States from the judgment of the en banc panel of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-referenced action on August 18, 2006, affirming the district court's minute order that denied the Dayton Office's Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(1).

This appeal is taken pursuant to 2 U.S.C. § 1412.

Date: October 31, 2006

Respectfully submitted,

s/Jean M. Manning
Jean M. Manning
Senate Chief Counsel for
Employment

Toby R. Hyman
Senate Senior Counsel for
Employment

Office of Senate Chief Counsel
for Employment
P.O. Box 77053
Washington, D.C. 20013
Telephone: (202) 224-5424
Facsimile: (202) 228-2557

Attorneys for Appellant,
Office of Senator Mark Dayton

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2006, I sent a true and accurate copy of the foregoing Appellant's Notice of Appeal to the United States Supreme Court by first-class U.S. mail, postage pre-paid, to the following individuals:

Richard A. Salzman, Esq.
Douglas B. Huron, Esq.
Tammany M. Kramer, Esq.
Heller, Huron, Chertkof, Lerner,
Simon & Salzman
1730 M Street, NW
Suite 412
Washington, DC 20036

Attorneys for Appellee Brad Hanson

s/Kathleen Joseph
Kathleen Joseph

[Filed October 31, 2006]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRAD HANSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.**
	)	**1:03CV01149 (RJL)**
OFFICE OF SENATOR	)	
MARK DAYTON,	)	
	)	
Defendant.	)	
	)	

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

Notice is hereby given that Defendant, Office of Senator Mark Dayton (the "Dayton Office"), hereby appeals to the Supreme Court of the United States from the judgment of the en banc panel of the United States Court of Appeals for the District of Columbia Circuit, entered in *Hanson v. Office of Senator Mark Dayton*, No. 04-5335, on August 18, 2006, affirming this court's September 7, 2004, minute order denying the Dayton Office's Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(1).

This appeal is taken pursuant to 2 U.S.C. § 1412.

Date: October 31, 2006 Respectfully submitted,

s/Jean M. Manning
Jean M. Manning
Senate Chief Counsel for
Employment
D.C. Bar No. 439942

Toby R. Hyman
Senate Senior Counsel for
Employment
Appearance pursuant to
Local Rule LCvR 83.2(e)

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